OFFICE COPY

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 781

MELVIN C. JENKINS, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 3, 1964
CERTIORARI GRANTED DECEMBER 14, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 761

MELVIN C. JENKINS, PETITIONER,

VS.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the District of Columbia		
Transcript of proceedings, May 24, 1963	2	1
Appearances	2	1
Testimony of Mrs. Sophie Korn—direct	5	1
—cross	14	6
Joseph Davis, Jr.—direct	24	7
—cross	27	9
Transcript of proceedings, May 27, 1963	38	10
Appearances	38	10
Testimony of Jerome Demoro—direct	39	10
—cross	44	14
Mrs. Ruth H. M. McLeish—direct	52	16
—cross	57	19
Miss Ruth Hodges—direct	63	20
—cross	68	23
—redirect	72	25
Government rests	73	26
Testimony of Phillip Korn—direct	73	26
Francis N. Savage—direct	80	28
Miss Ruth Hodges (recalled)—cross	85	30
—redirect	87	31
Francis N. Savage (recalled)—direct	88	32
—cross	89	33

	Original	Print
Record from the United States District Court for the District of Columbia—Continued		
Transcript of proceedings, May 27, 1963—Continued		
Testimony of Melvin C. Jenkins—direct	91	34
—cross	96	37
Defense rests	104	42
Charge to the jury	107	42
Transcript of proceedings, May 28, 1963	121	50
Appearances	121	50
Colloquy re testimony of Miss Ruth Hodges and reading thereof by Reporter	122	50
Verdict of jury	126	52
Reporter's certificate (omitted in printing)	128	
Proceedings in the United States Court of Appeals for the District of Columbia Circuit	133	53
Opinion, per curiam	133	53
Dissenting opinion, Wright, J.	134	54
Judgment	141	60
Order denying petition for rehearing en banc	154	61
Clerk's certificate (omitted in printing)	157	
Orders extending time to file petition for writ of certiorari	158	62
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	160	63

[fols. 2-4]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 208-63

UNITED STATES OF AMERICA,

vs.

MELVIN C. JENKINS, Defendant.

Transcript of proceedings—May 24, 1963

Washington, D. C.

The above cause came on for trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at 2:30 p.m.

APPEARANCES:

For the Government: John H. Treanor, Jr., Esq., Assistant United States Attorney.

For the Defendant: Thomas R. Jones, Esq.

* * * * * * *

[fol. 5] The Court: You may proceed, Mr. Treanor.

Mr. Treanor: Mrs. Korn, please.

SOPHIE KORN called as a witness by the Government, having been duly sworn was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Would you state your full name, please?

A. Mrs. Sophie Korn.

The Court: You will have to speak loud enough for everyone to hear you. Will you repeat your name, please?

The Witness: Mrs. Sophie Korn.

Q. Would you spell your last name, please?

A. K-o-r-n.

[fol. 6] Q. What is your occupation, Mrs. Korn?

A. I operate a grocery store with my husband.

Q. What is the address of that grocery store?

A. 301 12th Street, Southeast.

Q. Does that store have a name?

A. Phil's Market.

Q. Very briefly——

The Court: May I suggest you might as well fix the venue now.

By Mr. Treanor:

Q. Is that 301 12th Street in the District of Columbia?

A. Yes, sir.

Q. Would you very briefly, Mrs. Korn, describe the interior of Phil's Market?

A. Well, it's a small store. It's sort of oblong, it's short in the front and it's an oblong effect. I'd say about 12 feet long and about 12—not 12 feet. I was thinking of yards. Let's say about 15 feet long and I'd say about 5 feet wide.

Q. How many entrances to the store are there, Mrs. Korn?

A. One.

Q. Is there a counter in the store?

A. Yes, one counter almost the full length of the store.

Q. Now, Mrs. Korn, directing your attention to approxi-

[fol. 7] mately 12:40 p.m. of the 24th day of January 1963, do you recall whether or not at that time you were in your store?

A. I was in my store with my clerk at that time.

Q. What is your clerk's name?

A. Joe Davis, Jr.

Q. At that time was there any customer in the store?

A. Not at that time.

Q. Now, did there come a time in that—approximately at 12:40 or around there, that anything unusual happened in your store?

A. Yes.

Q. Would you describe now, Mrs. Korn, keeping your

voice up so we can all hear you, what, if anything, unusual happened that day at that time?

A. I was standing at the counter when the defendant came into the store, asking me for four pork chops. I then addressed this to my clerk then, Joe Davis, who weighed up the four pork chops. He had to go to the counter, almost the rear of the store. When he came back I asked him how much were they, and when we put the package on the counter this defendant was right opposite me across the counter and he looked me square in the face, he says I don't want those D pork chops. And I was looking at his face. So he looked down and there was a gun pointing directly at me.

[fol. 8] Q. What happened then, Mrs. Korn, if anything?

A. He said I don't want those D pork chops, I want your money. Whereby, I turned around, opened my cash register and told him to help himself.

Q. What happened then?

A. He said put the money in a bag, so I took a bag and I started putting the bills in the bag.

Q. Go on.

A. With that my husband, who was at the market at that time, opened the door and looked in and saw me putting the money in the bag. Generally children come into a store and purchase articles and you put the change in a bag so they don't lose it. Well, he looked around, there was no children, and he said what's going on here?

Mr. Jones: Objection to what.——

Mr. Treanor: Don't tell us what your husband said, Mrs. Korn.

The Court: If it was said in the defendant's presence it is part of the res gestae. That would be admissible.

By Mr. Treanor:

Q. Continue, Mrs. Korn.

A. So in a dialect, when he was entering the store, I told him to get out, there is a man here with a gun. Well, he probably, the excitement of seeing me putting money in the [fols. 9-11] bag, didn't hear me, but he came right into the store. And the defendant was standing right under a light, and when you come in it maybe looks dim, so he turned on the light.

Q. Who did that?

A. My husband. The light is on a chain. When he pulled the light the defendant turned around, saw my husband and fled.

Q. Did he take anything?

A. No.

Q. Can you describe the gun that you say was pointed at you?

A. It just looked shiny. I don't know anything about guns. I just saw it was a gun and it looked shiny to me.

Q. Were you able to tell it was a gun or appeared to be a gun?

A. Oh, yes, it was a gun.

* * * * * * *

[fol. 12] Q. After the man left your store, Mrs. Korn, what did you do then?

A. My husband—as soon as he left, my husband, not thinking, ran after him in the street and was yelling for police. Then he came back into the store and he says we should call the police.

Mr. Jones: Objection, Your Honor; a statement made outside the presence of the defendant.

The Court: Well, of course, it is immaterial. I am going to sustain the objection. Make your questions more specific.

Q. What did you do then, Mrs. Korn, if anything?

A. Called the police.

Q. Did you describe this man to the police?

The Court: No, we don't need all that. That is all for cross-examination. You have got her prima facie testimony.

Q. Now, did the police come?

[fol. 13] A. Almost immediately.

Q. Did there come a time, Mrs. Korn, when you saw this man again?

A. Yes, sir.

Q. How long after he had left the store did you see him again?

A. Oh, it seemed like about ten minutes.

Q. Did he come into the store?

A. He was brought into the store by an officer.

Q. Do you know what that officer's name was?

A. I can't recall. He is in the witness room. I don't know his name.

Q. Was he in uniform?

A. No, sir.

Q. Now, what happened then, when he brought him in?

Mr. Jones: Your Honor, may I address an objection? Your Honor, I object to any testimony indicating a prior identification on the grounds it would be——

The Court: Objection overruled.

Mr. Jones: —on the grounds of accrediting the witness.

By Mr. Treanor:

Q. What happened, Mrs. Korn, after the policeman brought the defendant into the store?

[fols. 14-16] The Court: Brought the man into the store.

Mr. Treanor: I'm sorry, Your Honor; brought the man in.

The Witness: They asked me if that was the man who had tried to hold me up, and I said yes.

By Mr. Treanor:

Q. Do you see the man in the courtroom today, Mrs. Korn?

A. Yes, sir, he is sitting right over there.

Q. And how is he dressed today?

A. How is he dressed today?

Q. Yes.

A. Well, he's just got a blue shirt on.

Mr. Treanor: May the record indicate, Your Honor, that Mrs. Korn has identified the defendant, Melvin Jenkins?

The Court: The record may so indicate.

Mr. Treanor: I have no further questions.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

. . . . . .

[fol. 17] Q. Now, did you notice the clothing of the man that entered the store?

A. No, sir.

Q. Do you recall anything about a coat that he had on?

A. Well, he seemed to have a three-quarter coat on.

Q. Can you describe that coat any more fully?

A. No, sir; just a coat, just knowing that he was covered with a coat.

Q. Did you notice anything about his shoes?

A. No, sir.

Q. Did you notice whether he had a cap on?

A. It looked like he had a soft hat on.

Q. Now, you said that shortly afterward the police brought a man back to the store?

A. Uh-huh.

Q. Did you notice what kind of a coat that man had on?

A. He wasn't wearing the same coat.

Q. It was a different coat?

A. Different coat.

[fols. 18-23] Q. How would you describe that coat?

A. Well, this coat was more of a zippered suede or leather effect, short, hip length.

Q. Did you notice whether or not that man had a cap on?

A. No, then I didn't.

Q. Did you notice what kind of pants or trousers that man had on?

A. No.

Q. And are you positive that he had a different coat, you saw a different coat when the police brought this man back?

A. Yes, sir.

. . . . . .

[fol. 24] JOSEPH DAVIS, JR. called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Sir, would you state your full name?
A. Joseph Davis, Jr.
Q. How old are you, Mr. Davis?
A. Eighteen.
Q. Are you employed?
A. Yes, sir.
[fol. 25] Q. Where?
A. At Steak Ranch.
Q. On the 24th of January——

The Court: Employed where?
Mr. Treanor: The Steak Ranch was his answer.

By Mr. Treanor:

Q. On the 24th day of January, Mr. Davis, where were you employed?
A. At Phil's Market.
Q. How long had you been working there?
A. About a month or two.
Q. Directing your atention, Mr. Davis, again to the 24th of January, were you working there approximately 20 minutes of one in the afternoon?
A. I was.
Q. Do you recall at that time anything unusual happening in Phil's Market?
A. Yes.
Q. Tell us now, keeping your voice up, Mr. Davis, so that we can all hear you, nice and slowly, what happened, if anything than usual, that day?
A. A man came in. He ordered some chops and I waited on him. As I brought the chops up to the front he pulled a gun out and he told Mrs. Korn that he didn't want the chops, [fol. 26] he want the money. So she opened the drawer and told him to help hisself, and he told her to put it in a bag, so she put the money in a bag, and while she was putting the

money in a bag her husband walked in the door and asked what was going on. So he walked over and pulled on the light, and the defendant, he turned around and looked at the man and ran out the door.

Q. Did you see this man again that day?

A. I did.

Q. When was that?

A. About five minutes later a plain clothes detective brought him back.

Q. Mr. Davis, was he dressed any differently when he was brought back than when you first saw him come into Phil's Market?

A. Yes, sir.

Q. What difference was there?

A. He had on a shorter coat and it was a tan leather jacket. He didn't have on a hat.

Q. Was it the same man?

A. Yes, sir.

Q. Do you see that man in the courtroom today, Mr. Davis?

A. Yes, sir.

Q. What does he have on?

[fols. 27-30] A. He have on a blue shirt.

Mr. Treanor: May the record indicate, Your Honor, that the witness has identified——

The Court: Has he pointed to the man?

Mr. Treanor: Well, he looked that way.

The Court: Well, that is not enough.

By Mr. Treanor:

Q. Would you point to him, please, Mr. Davis?

A. The defendant over there (indicating).

The Court: He has pointed to him now. The record may indicate that he has identified the defendant.

Q. Had you ever seen him before that day, the 24th of January 1963?

A. No, I haven't.

Mr. Treanor: That is all the questions I have.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

. . . . . .

[fols. 31-33] Q. Now, when he first came in, this man, you say that he had a long coat on?

A. That's right.

Q. Can you describe the coat any further?

A. I think it reached down to his knees and it was kind of white or tan.

Q. Kind of which?

A. White or tan.

Q. Was it leather or suede or was it khaki?

A. I think it was suede.

[fols. 34-36] Q. You said that when this man was brought back to the store, that he had a different coat on?

A. That's right.

Q. Would you describe that coat?

A. It was a short leather coat.

Q. What color?

A. Brown.

Q. What about a hat, did he have a hat?

A. No, he didn't.

Q. And how long after he left did he come back in?

A. After he left?

Q. Yes

A. Well, about five minutes later the policeman brought him back.

Q. Could it have been any less than five minutes?

A. It's possible.

. . . . . .

[fol. 37] The Court: I think we will recess this trial at this time until Monday morning. Ladies and gentlemen of the jury you will be excused at this time until Monday morning at 10 o'clock. Please be back in the courtroom a few minutes before 10 o'clock on Monday morning.

(At 3:50 p.m. trial stood in recess, to reconvene 10:00 a.m., May 27, 1963.)

[fol. 38] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 208-63

[Title omitted]

Transcript of proceedings—May 27, 1963

Washington, D. C.

The above cause came on for further trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at 10:00 a.m.

APPEARANCES:

For the Government: John H. Treanor, Jr., Esq., Assistant United States Attorney.
For the Defendant: Thomas R. Jones, Esq.

[fol. 39] Proceedings

The Deputy Clerk: United States vs. Melvin C. Jenkins.
The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Court: You may proceed, Mr. Treanor.
Mr. Treanor: Officer Demoro.

JEROME DEMORO called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Would you state your full name, please?
A. Jerome Demoro.
The Court: How do you spell your last name?
The Witness: D-e-m-o-r-o.

Q. What is your duty assignment?

A. I am detailed to what is known as the Fifth District Tactical Force.

Q. Are you a member of the Metropolitan Police Department?

A. Yes, I am.

Q. And to which precinct are you assigned?

A. No. 12.

[fol. 40] Q. How long have you been a member of the Metropolitan Police Department?

The Court: I don't think that is necessary. We don't do that, Mr. Treanor. On cross-examination they can ask him that if they want to know.

By Mr. Treanor:

Q. Directing your attention, Officer Demoro, to the 24th day of January——

The Court: You can ask him what his duties are and so on.

Q. What is the nature of your duties with the Metropolitan Police Department?

A. We cruise in private automobiles, in casual clothing, not in uniform, and cruise for housebreakers, robbery suspects and stolen automobiles.

Q. Directing——

The Court: What is the name of the squad to which you are assigned?

The Witness: It's called the Fifth District Tactical Force.

Q. Directing your attention to the 24th day of January 1963, were you so assigned then?

A. Yes, I was.

Q. And directing your attention to approximately 12:40 [fol. 41] p.m., do you recall being on duty at that time?

A. Yes, I do.

Q. Do you recall at that time being in the vicinity of 19th and C, Northeast?

A. Yes, sir, we were.

Q. Were you on duty with someone else?

A. Yes, sir.

Q. Who was that?

A. Officer George F. Briggs, from the 9th Precinct.

Q. Briggs?

A. Yes, sir.

Q. Were you traveling on foot?

A. No, sir, we were in a private auto.

Q. Whose automobile?

A. Officer Briggs'.

Q. Now, again directing your attention to approximately 12:40 p.m., did there come a time when you received a radio call for a run to 301 12th Street, Northwest?

A. Yes, sir.

Q. Now, starting with that first call, Officer Demoro, would you tell us what calls you received and what you did thereafter?

The Court: No, he can't state what calls he received. That would be hearsay.

Mr. Jones: Your Honor, may I inquire whether that——

[fol. 42] The Court: Speak up, Mr. Jones.

Mr. Jones: May I inquire whether the officer meant 301 12th Street, Southeast?

The Court: You may not inquire at this time.

By Mr. Treanor:

Q. Officer Demoro, did you receive a call for 301 12th Street, Southeast or Northeast?

A. Southeast.

Q. Thank you. Now, as a result of receiving this call what did you do?

A. We went immediately to East Capitol and 12th Street, Northeast, that would be on the northeast side of Lincoln Park, and stopped.

Q. In the automobile?

A. In the automobile.

Q. Continue, please.

A. We parked there and waited for a general broadcast to come out, which came out at approximately 12:43. The general broadcast described——

Q. Don't tell us that.

The Court: Don't tell us what the general broadcast was. Just tell us what you did and what you saw.

A. We parked. We observed the defendant, Melvin Jenkins, approximately 20 feet in the park. He was going [fol. 43] north towards 12th Street. He showed signs of breathing heavy. There was vapor coming from his mouth, as though he had been running. He seemed very nervous, he kept looking back. We observed him cross East Capitol Street in front of the car and proceed down 12th Street to the mouth of the alley and he turned west into the alley towards 11th Street. He went in approximately 20 feet or so, turned around, took three or four steps back, turned again and ran towards 11th Street, at which time we gave chase in the auto and stopped the defendant as he turned onto the sidewalk on 11th Street. We placed him under arrest. We took him back to the scene, where he was identified. He was then taken to No. 5.

The Court: When you say he was identified, tell us just what happened and what was done and what was said.

The Witness: When we got back to the scene—well, first, we asked him or we told him, You could help us by coming back with us. We placed him into the back seat of the car after a preliminary search of his person for weapons. We took him back to 301 12th Street, Southeast, at which time he refused to get out of the car. We ordered him from the car and myself and two uniformed men took him into 301 12th Street, Southeast, where Mrs. Sadie Korn and Joe Davis, Jr., the Clerk, both identified him as the man who had been in there previously with the gun.

[fol. 44] By Mr. Treanor:

Q. Was Mr. Korn there?

A. Yes, sir, he was.

Q. Was he able to identify the defendant?

A. He said he wasn't sure, that his wife would have to see him.

Q. Were there other police cars there when you arrived?

A. Yes, sir, there were.

Q. At 301 12th. After being identified by Mrs. Korn and Joe Davis did the defendant say anything?

A. He says, I don't know what you are talking about.

Mr. Treanor: I believe that is all I have.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

. . . . . .

[fol. 45] Q. Officer, where were you standing when you first saw the defendant?

A. I was sitting in the car, wasn't standing.

Q. Where were you sitting in the car?

A. On East Capitol Street at 12th, on the east side of the intersection.

[fol. 46] Q. And how far was the defendant from you when you first observed him?

A. He was on the other side of East Capitol Street, approximately 20 feet or so into the park.

Q. Do you recall noticing what he wore at that time?

A. Yes, sir; he had on a suede leather jacket with a zipper front, tan trousers. As to whether he was wearing a hat or not I am not sure.

Q. Did you notice the length of the coat?

A. Yes, sir; it was pulled down—it was a waist-length jacket that had been pulled down in the front and yet was at his waist in the back, as though he had had his hands in the pockets and pushed the front down.

Q. It was a short coat, was it?

A. Yes, sir, it was.

Q. And it was a leather surface coat?

A. Yes, sir.

Q. When you first saw him how fast was he running?

A. He wasn't running.

Q. He was walking?

A. Yes, sir.

Q. And was he walking along the sidewalk when you first saw him?

A. Yes, sir.

[fol. 47] Q. Now, how far from the point that you first saw him did you stop him and question him?

A. He had crossed East Capitol, gone as far as the first alley on 12th Street and proceeded through that alley to 11th.

Q. Could you estimate the distance?

A. Well, it would be one city block from 12th to 11th and

approximately, I would say, about 300 feet from the park over.

Q. Did he look back toward you during that time?

A. Yes, sir, he did, several times.

Q. Did he commence to run then?

A. Only when he reached the alley.

Q. Did you undertake to search him in the alley?

A. No, sir; he had already gotten through the alley to 11th Street, and when we stopped him on 11th Street my partner and myself both jumped from the car and hollered police, and he stopped and turned around, facing us, and my partner went towards him and as he approached the defendant threw both arms straight out and my partner went down his sides.

Q. Did you search him yourself?

A. No, sir, I did not.

Q. Did you observe your partner recover any weapon from him?

[fols. 48-51] A. No, sir, I did not.

Q. And did you search him at any time later?

A. I personally did not.

Q. Did you observe anyone else search him at any time later?

A. No, sir, I didn't.

The Court: What is it you want to know, Mr. Jones?

Mr. Jones: I want to know, Your Honor, whether or not a weapon was recovered from this——

The Court: Don't make a mystery of it.

Mr. Treanor, was any weapon found on the defendant's person when he was arrested?

Mr. Treanor: No, Your Honor.

* * * * * * *

[fol. 52] RUTH H. M. MCLEISH called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination

By Mr. Treanor:

Q. Ma'am, I'd like you to answer my questions now in a loud voice so that we can hear you all over the courtroom.
What is your name?
A. Ruth Halsey Morgan McLeish.
Q. Are you Mrs. McLeish or Miss?
A. Mrs.
Q. Where do you live?
A. 428——

The Court: What is your first name?
The Witness: Ruth.
The Court: Which count of the indictment is this directed to, Mr. Treanor?
Mr. Treanor: This is directed to the first count.
The Court: Very well, you may proceed.

Q. Where do you live, Mrs. McLeish?
A. 428 Kenyon Street, Northwest.
Q. In the District of Columbia?
A. Yes.
[fol. 53] Q. Now directing your attention, Mrs. McLeish, to December 27, 1962, were you employed on that date?
A. Yes, I was.
Q. Where?
A. At 138 7th Street, Northeast.
Q. What establishment is located there?
A. High's Dairy Products.
Q. High's?
A. High's Store.

The Court: You might fix the venue if you want to.

By Mr. Treanor:

Q. Is that in the District of Columbia, Mrs. McLeish?

A. Yes, it is.

Q. Now, were you working approximately 6:45 p.m. on that date?

A. Yes, I was.

Q. Was there anyone working with you?

A. Yes, Mrs. Hodges.

Q. What is the general nature of your duties there at High's?

A. Well, it's a clerk, selling. I am a clerk, sales clerk.

Q. Now, did there come a time just shortly prior to 6:45 when you left the store?

[fol. 54] A. Yes; I was on my lunch hour and I went out to the Safeway to buy some things.

Q. Approximately how long were you gone?

A. Oh, about 10 or 15 minutes.

Q. Now, as you returned to the store, Mrs. McLeish, did you see anyone standing out in front of it?

A. Yes, I saw a man.

Q. Do you see that man in the courtroom today?

A. No; you are in the way.

Q. Please?

A. Yes, he is here; that man right in the middle.

Q. In the middle?

A. In the middle of those two men.

Q. What is he wearing, Mrs. McLeish?

The Court: Let him put his hands down so the witness can see him.

A. He was wearing——

Q. No; what is he wearing now?

A. He is wearing a blue shirt.

Mr. Treanor: May the record indicate, Your Honor, that Mrs. McLeish has identified the defendant?

The Court: The record may so indicate.

By Mr. Treanor:

Q. Now, when you saw the defendant, Mrs. McLeish, [fol. 55] standing in front of the High's store what, if anything, was he doing?

A. He was looking to and fro. He was looking up the street and down. I thought he was a customer and I was going to speak to him as I approached him, and when I got close enough I saw he wasn't a customer, so I just continued on into the store.

Q. How close did you come to him?

A. I passed right—I could touch him, I was that close to him.

Q. Did you look at his face?

A. Yes, I looked at him because I thought he was one of our customers.

Q. And what did you do then?

A. I kept on going. I went on in the store, took off my coat and hat, came back in the store to eat my lunch.

Q. Was there anyone else in the store now when you returned?

A. Mrs. Hodges was waiting on a little boy about seven or eight years old. As soon as the little boy left the store this man came in.

Q. Continue now and tell us what, if anything, happened then.

A. Well, he just pointed a gun at Ruth and she opened [fol. 56] the drawer and she said, Do you want the change? And he said, No; lady, just the bills. I walked around her and looked at him. I was just looking at him. I didn't say anything, didn't do anything. I just looked at him. He got the money and ran out of the store. Then I called the police.

Q. How close did you come to him in the store?

A. I don't know. I was very close to him. I guess about maybe to the end of this desk right here (indicating).

Q. Would you say a few feet?

A. Just a few feet away from him.

Q. Were you behind the counter, Mrs. McLeish?

A. Yes, I was.

Q. And he was on which side?

A. And he was in front of the counter.

Q. Are you able to describe the gun that you saw?

A. No, because I just saw a small part of the barrel, the end of it.

Q. Did you hear the defendant say anything else except just the bills?

A. No, he didn't say anything, just the bills, just the bills, lady. That's what he said.

Q. Had you ever seen this man before?

A. No, I never seen him before.

Q. Now, did there come a time after that date, Mrs. [fols. 57-58] McLeish, that you saw him again?

A. Yes, I saw him on February 7th at the Grand Jury.

The Court: You saw him when?

The Witness: On February 7th.

By Mr. Treanor:

Q. Where did you see him?

A. In the Commissioner's office.

Q. Did you identify him then?

A. No, they didn't ask me to identify him, but I knew him.

Q. Was it the same man?

A. Yes.

Mr. Treanor: I have no further questions, Your Honor.

The Court: Any cross-examination?

Cross-examination.

By Mr. Jones:

[fol. 59] Q. Did you notice on that date, December 27th, 1962, whether or not the defendant had—or whether or not this individual whom you have identified as the defendant had a cap on?

A. He had a hat on with a bill or a beak, I guess they call it, and a knitted part that comes down over your ears in cold weather. I don't know what they call those kind of caps.

Q. Did that cover any part of his face?

A. No.

[fol. 60] Q. But it covered his ears?

A. No, he didn't have the knitted part down. The knitted part was up. But it covered his head.

Q. Did it cover his entire head?

A. Yes.

Q. Did you notice any unusual marks or scars about his face?

A. No, only that his eyes were large.

Q. Did you notice anything about his shoes?

A. No, I couldn't see his feet.

Q. Now, how far were you standing from the cash register when he first—when you saw this man first enter?

A. I don't know. I was on the opposite side of the cash register and I walked around to the cash register.

Q. Well, was it a matter of a few feet?

A. Yes.

Q. And then you said, I think, that certain money was taken from the register?

A. Yes.

Q. Where was the money put?

A. Miss Hodges put it in a bag.

Q. What kind of a bag?

A. A paper bag.

Q. Did you notice whether this individual touched the [fols. 61-62] counter or touched the cash register?

A. No, he didn't touch anything. He just stood there and she put the money in the bag and he left the store.

Q. Could you estimate how long he was in the store?

A. About maybe three to five minutes. It didn't take him long.

Q. Could it have been shorter than three to five minutes?

A. No, I don't think so.

* * * * * * *

[fol. 63] Ruth Hodges called as a witness by the Government, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Treanor:

Q. Ma'am, I'd like you to keep your voice up now so [fol. 64] we can hear you all over the courtroom.

What is your name?

A. Ruth Hodges.

Q. Are you Mrs. Hodges or Miss?

A. Miss.

Q. Miss or Mrs.?

A. Miss.

Q. Where do you live, Miss Hodges?

A. 311 17th Street, Southeast.

Q. Directing your attention to approximately 6:45 p.m. on the 27th day of December 1962, were you employed then?

A. Yes.

Q. And were you working then?

A. Yes.

Q. Where?

A. At 138 7th Street, Northeast.

Q. What is the name of that place?

A. High's Ice Cream Store.

Q. How long have you worked there?

A. About 13 years.

Q. Who was in charge of the store that evening, Miss Hodges?

A. I was.

Q. Was there another employee working?

[fol. 65] A. Yes.

Q. Who was that?

A. Mrs. Ruth McLeish.

Q. Directing your attention now again to approximately 6:45 p.m., did there come a time around that time that anything unusual happened in the High's store?

A. This fellow came in——

Q. Keep your voice up.

A. This fellow came in with a gun and just leaned over the counter and pointed it towards me, and I started giving him the money and he ran out.

Q. Did this man say anything to you?

A. He didn't say a thing. When I gave him the bills I asked him did he want the change and he said, Just the bills, lady. He did say that, Just the bills, lady.

The Court: Part of the witness' answer was mumbled a little bit. I am going to have the Reporter read it.

(The last answer was read by the Reporter.)

By Mr. Treanor:

Q. Are you able to describe the gun that this man had?
A. Yes.
Q. What did it look like?
A. It was short and looked sort of gray-ish in the light.
[fol. 66] Q. How much of the gun were you able to see?
A. Just the end of the barrel.
Q. Where were you standing when you saw this gun?
A. Near the cash register.
Q. Where was Miss Hodges—I'm sorry—Mrs. McLeish?
A. She was on the righthand side of me whe he first came in and she went behind me on the lefthand side.
Q. Did this man stand across the counter from you?
A. Yes.
Q. At this time was there anyone else in the store?
A. No.
Q. Had you ever seen this man before?
A. No.
Q. Until you came to court for the trial of this case on Friday had you seen him since that date, since the 27th of December? Between the time of the trial and the time of the holdup of your store did you see him in between?
A. No.
Q. Now, how much money did you give him?
A. Around $38, I think.

The Court: How much?
The Witness: Around 38.

By Mr. Treanor:

Q. How did you arrive at that figure?
[fol. 67] A. We checked the cash register afterwards.
Q. Do you recall the denominations?
A. No.
Q. Did you give him any change?
A. No.
Q. Did this money belong solely to High's, as far as you know?
A. Yes.
Q. Was this money ever recovered?
A. No.

Mr. Treanor: I have nothing further.

The Court: Any cross-examination?

Mr. Treanor: I'm sorry, Your Honor. May I ask one final question?

The Court: Surely.

By Mr. Treanor:

Q. Ma'am, do you see the man that you have told us about who came into your store on the 17th day of December, do you see him in the courtroom now?

A. Yes.

Q. What is he wearing and where is he sitting?

The Court: No; just have her point to him.

Q. Would you point to him, please?

A. Sitting over there (indicating.)

[fol. 68] Q. What is he wearing?

A. A blue shirt, all I can see.

Mr. Treanor: May the record indicate, please, Your Honor, that Miss Hodges has identified the defendant?

The Court: The record may so indicate.

Mr. Treanor: I have nothing further.

The Court: Any cross-examination?

Mr. Jones: May I ask if Mr. Treanor has any statements from this witness?

Mr. Treanor: The Government has no statements by this witness, Your Honor.

The Court: Very well.

Cross-examination.

By Mr. Jones:

Q. Now, Mrs. Hodges, shortly after this incident occurred did the police arrive at the store?

A. Yes.

Q. And did they ask the people involved whether they had a description of this individual?

A. Yes.

Q. And were you able to give the police a description?

A. Yes.

Q. What description did you give them?

A. He had on a hat that come down over his ears, turned [fol. 69] up, and a car coat, and that's all I saw of him.

Q. Were you able to give a description of his features?

A. He was fat, big and fat; just fat.

Q. Do you recall having a conversation with a Mr. Savage of the Legal Aid Agency on April 9th, 1963?

A. No.

Q. Do you recall an investigator of the Legal Aid Agency talking to you and asking you if you knew anything about this case?

A. No.

The Court: What is your answer?

The Witness: No.

By Mr. Jones:

Q. Well, now, you are Mrs. Ruth Hodges of 311 17th Street, Southeast, is that correct?

A. Yes.

Q. And you do not recall having any such interview with any investigator of the Legal Aid Agency?

The Court: She has already answered your question.

Q. Now, did you make this description from your own observation or did you base it upon something Mrs. McLeish told you?

A. No, my own observation.

Q. You are positive of that?

[fol. 70] A. Uh-huh, yes.

Q. And you are positive again that you were able to give the police a description?

A. Yes.

Q. And again you say that this man here was the one that was in the store on that day?

A. Yes.

Mr. Jones: May we approach the bench, please, Your Honor?

The Court: Yes, indeed.

(At the Bench:)

Mr. Jones: Your Honor, I intend to offer a prior inconsistent statement that was made to a Legal Aid investigator, but I, of course, did not subpoena him because I was not aware that the statement would be inconsistent. Therefore, I would, if possible, like to try to contact him and have him standing by.

* * * * * * *

[fol. 71] Q. Isn't it true, Mrs. Hodges, that you were actually unable to identify this defendant on a prior occasion?

The Court: You will have to specify the prior occasion. You can't ask enigmas like that.

Q. Was there a prior occasion when you were unable to identify this defendant?

The Court: No, no; you will have to make clear what you are referring to. You cannot mystify a witness, Mr. Jones.

Mr. Jones: Very well, Your Honor, I have no further [fol. 72] questions at this time.

The Court: Very well.

Redirect examination.

By Mr. Treanor:

Q. Do you recall anyone at all other than the police coming to talk to you about this case, Miss Hodges?

A. No, I can't remember no one but the police.

Q. Did anyone come to talk to you after the day of the events; that is, after the 27th day of December did any policeman come to talk to you then?

A. Not as I can recall.

Q. Did anyone call you at your home or at the store?

A. None other than tell me to meet here, to come here. I mean to the court, District building.

Q. Have you ever told anyone, that you can recall, that you could not identify the defendant?

A. No.

Mr. Treanor: I have nothing further, Your Honor.
The Court: You may step down.

(Witness excused)

* * * * * * *

[fol. 73] Mr. Treanor: The Government rests, Your Honor.
The Court: Very well. You may proceed, Mr. Jones.
Mr. Jones: I would like to call Mr. Phillip Korn, please.

Phillip Korn called as a witness by the defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jones:

Q. Would you state your name, please, sir?
A. Phillip Korn.
Q. And where are you employed?
A. For myself.
Q. Where?
A. 301 12th, Southeast.
[fol. 74] Q. And what are those premises known as?
A. A grocery, grocery store.
Q. And are you an owner?
A. Yes, sir.

The Court: What are they known as did you say?
The Witness: A grocery store.

By Mr. Jones:

Q. Would you give us the name of that grocery store?
A. Phil's Market, P-h-i-l-'s.
Q. Do you own that store yourself or is there a co-owner with you?
A. My wife.
Q. And your wife's?
A. Sophie Korn.
Q. Now, were you there on January 24th, 1963?

A. Yes, sir.

Q. Do you recall coming into that store about, oh, some time after noon on that date?

A. About one o'clock I came into the store.

Q. Now, where had you been before you came into the store?

A. In the market.

Q. And what was the first thing that you did when you entered the store?

[fol. 75] A. I entered the store and I seen my wife was putting money in a bag.

Q. And what did you do?

A. I seen the boy was in the corner and my wife was *putting* money in the bag. It looked kind of funny to me. Usually when my wife puts money in a bag it's when the kids are around and you give them the change or something, you put it in the bag. So I looked around and see there was no kids. So I seen something funny was going on so I put the light on.

The Court: Speak a little louder.

A. I put the light on.

Q. Did it appear to you to be a little dim in there?

A. Yes. When you come from the outside it looked, you know. When I put the light on the man looked at me and he ran out.

Q. Now, how close were you to the man?

A. Right in the back of him.

Q. And when he looked at you was he facing you?

A. No. When he looked at me he did face me and he ran out.

Q. Now, could you say one way positively or not whether or not this man here is the man that you saw?

A. I couldn't say for sure. He wore a different coat when they brought him in.

[fol.s 76-79] Q. But you couldn't say for sure one way——

The Court: He has answered your question. Don't keep repeating.

By Mr. Jones:

Q. Is your vision satisfactory?

A. Yes.

Q. Now, were you present—strike that. Do you recall being present in the store when the police brought a man back?

A. I was outside and I seen the police cars coming and an officer come over and says is that the man? I called the police before that. And the officer asked me if that's the man. I says the man that held me up, I says, wore a long overcoat. So I says I cannot recognize him, but I says take him in the store, maybe my wife and the boy will recognize him.

[fol, 80] FRANCIS N. SAVAGE called as a witness by the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jones:

Q. Would you state your name, please, sir?

A. Francis N. Savage.

Q. And where are you employed?

A. Legal Aid Agency.

Q. And in what capacity are you employed there?

A. As an investigator.

[fol. 81] Q. And what are your duties as an investigator?

A. I investigate—rather, I attempt to locate witnesses, interview them in regard to cases as assigned by the Court and to our attorneys.

Q. And how long have you been working in that capacity?

A. About two and a half years.

Q. Have you had any investigative experience prior to that?

The Court: He is not testifying as an expert, I presume. You don't have to qualify him as an expert.

By Mr. Jones:

Q. Now, Mr. Savage, do you recall conducting an investigation in the case of United States vs. Melvin Jenkins?

A. I do.

Q. And did you make a report of that investigation?

A. Yes.

The Court: I don't think that is relevant, whether he made a report or not. Just get to what you wish to bring out, to the crux of the matter.

Q. On April 9th of 1963, sir, did you have an occasion to interview a Mrs.—Miss Ruth Hodges?

A. I did.

Q. And how was that interview conducted?

A. By telephone.

[fol. 82] Q. And do you recall asking her any questions relative to the identification of the defendant, Melvin Jenkins?

The Court: Just say yes or no, please.

A. Yes, sir.

Q. What were those questions and, if you recall, what were her replies?

The Court: Now just a moment. I am going to ask counsel to come to the bench.

(At the Bench:)

The Court: I am going to exclude this at the present posture of the case. Whenever you want to offer a contradictory statement that you allege was made by a witness you first have to confront the witness on cross-examination with that contradictory statement and ask her whether the witness made it.

* * * * * * *

[fol. 83] Mr. Jones: Your Honor, I thought that the interview was conducted person to person when I asked the question.

The Court: By phone.

Mr. Jones: But I now, upon talking to Mr. Savage, he advised me that the interview was conducted by phone.

The Court: Then you must also confront the witness with the specific statement, the occasion of the statement, what you claim was said and to whom.

Now at the present posture of the case I am going to [fol. 84] exclude that.

Is Ruth Hodges still here?

Mr. Treanor: Yes, she is, Your Honor.

The Court: If you want to recall her for additional cross-examination I will let you do it.

* * * * * * *

[fol. 85] The Court: You are asking leave to withdraw Mr. Savage temporarily and to reopen the cross-examination of Ruth Hodges, is that it?

Mr. Jones: That is correct, Your Honor.

The Court: Very well, leave is granted.

Mr. Jones: Thank you.

(The witness Francis Savage temporarily withdrew from the witness stand.)

Ruth Hodges recalled to the witness stand by the Defendant, having been previously duly sworn, was examined and testified further as follows:

Further cross-examination.

By Mr. Jones:

Q. Miss Hodges, do you recall receiving a telephone call [fol. 86] on the 9th of April 1963 from a Mr. Francis Savage, an investigator of the Legal Aid Agency?

A. Yes.

Q. And do you recall telling Mr. Savage over the telephone that you could not——

The Court: Don't ask whether she recalls. You may ask her, Did you tell him so and so. Because when you say do you recall telling him, that assumes that she did.

By Mr. Jones:

Q. Did you tell him that you could not identify the defendant, Melvin Jenkins, as being the person that held up High's Ice Cream Store on December 27th, 1962? Do you recall—strike that. Did you tell Mr. Savage that on April 9th, 1963?

A. I told him that I didn't get a description of him all over, I did his face, and that Miss McLeish was getting—she was standing beside me so she got a better description than I did, that he consult her. But I saw his face.

Q. But the question is, did you tell him that you couldn't identify him?

A. Yes.

Q. You did.

The Court: Did you tell Mr. Savage that you could not identify this defendant as being the man who held up the store? Did you tell him that? Do you understand that?

[fol. 87] The Witness: I told him that I could his face part, but that Mrs. McLeish got a better description of him.

The Court: We are asking you whether you told Mr. Savage that you could not identify this defendant. Did you tell him that?

The Witness: Well, no, I didn't tell him.

Mr. Jones: Very well. Thank you.

May I recall Mr. Savage?

The Court: Have you any redirect, Mr. Treanor?

Mr. Treanor: I was thinking. I'm sorry,. Your Honor. Just one question, please.

The Court: Surely.

Redirect examination.

By Mr. Treanor:

Q. You were asked on cross-examination on your appearance when you took the stand a few months ago, fifteen minutes or so ago, if you had been approached by anyone from the Legal Aid. Did you know then what the Legal Aid meant?

A. No, I didn't understand that part.

Q. Do you know now?

A. Yes.

Mr. Treanor: I think that is all I have.
The Court: Very well, you may step down.

(Witness excused)

[fol. 88] Mr. Jones: Your Honor, at this time I would like to recall Francis Savage.
The Court: Very well, you may recall him.

Francis N. Savage resumed the witness stand and was examined and testified further as follows:

Direct examination (Continued)

By Mr. Jones:

Q. Mr. Savage——

Mr. Jones: Would Your Honor like me to repeat the prior testimony or start over again?
The Court: Don't repeat anything.

Q. Mr. Savage, do you recall having a telephone conversation with Mrs. Ruth Hodges?
A. I do.
Q. On April 9th 1963, relative to the case now on trial?
A. I do, sir.
Q. Do you remember whether she told you anything about the identification of the defendant as the individual who held up——

The Court: He is your witness. You must not ask him leading questions. You may ask him what did she say.

Q. What did she tell you with regard to the robbery of High's Ice Cream Store on December 27th, 1962?
[fol. 89] A. In regard to the identification she told me——

The Court: You are not limited to identification. What did she tell you about the robbery? That is the question.
The Witness: She told me that a man came in, held a gun and asked for the money.
The Court: Speak a little louder because some of the jurors are quite a distance away.

The Witness: That she was not able to identify the man and that Mrs. McLeish picked the man's picture from a group of pictures furnished her by the police,

Mr. Jones: That is all I have, Your Honor.

Cross-examination.

By Mr. Treanor:

Q. Mr. Savage, did you ask her for a particular description, that is, did you ask her what clothes the man had on?

A. No, sir, I did not.

Q. Did you ask her if she could remember his face?

A. No, sir.

Q. Did she give you any reason why Mrs. McLeish would be better able to furnish a description?

A. She simply said that she was very frightened and she just did what he said.

Q. She meaning Miss Hodges?

A. Mrs. Hodges, yes.

[fol. 90] Q. Did you ask her the specific question concerning her face?

A. Concerning her face?

Q. Right. That is, did you specifically ask her if she remembered the man's face?

A. I am not sure. I don't believe I did.

Q. How did you ask her for this description?

A. I asked her if she was able to identify the defendant. I asked her if she had picked him out of a line-up. She told me no, she was unable to identify him and that Mrs. McLeish did, in the manner in which I have already described.

Q. In other words, you didn't break it down, you didn't break the question concerning the description down to whether you meant a description by face or a description by clothing and appearance?

A. No, I did not.

Mr. Treanor: I have nothing further.

Mr. Jones: That is all. Thank you.

The Court: You may step down.

(Witness excused)

Mr. Jones: Would Your Honor indulge me for a moment, please?

The Court: Surely. Take whatever time you need.

(Pause.)

[fol. 91] Mr. Jones: May I call the defendant, please.

The Court: Surely.

Melvin C. Jenkins the Defendant, called to the witness stand, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Jones:

Q. Will you state your name, please?

A. Melvin Carl Jenkins.

Q. Are you the defendant in this case?

A. I am supposed to be.

Q. And what is your address?

A. 1240 11th Street, Southeast.

The Court: Speak slowly and distinctly so we can all understand you.

Q. What is your occupation?

A. Dish washer, up on a truck.

The Court: Speak up loud.

The Witness: Dish washer and helper on soda trucks part-time.

The Court: Dish washer and what?

The Witness: Helper on soda trucks.

Q. How long have you lived in Washington?

A. All my life.

[fol. 92] Q. And how old are you?

A. Nineteen.

Q. Now, directing your attention to January 24 of 1963, do you recall that date?

A. Yes, sir.

Q. Do you recall whether or not you were arrested on that date?

A. I was.

Q. And where were you at the time?

A. Between 11th and East Capitol, 11th and Constitution Avenue.

Q. Do you recall what clothing you had on at the time?

A. A brown leather suede jacket, gray hat and gray pair of pants, trousers.

Q. And how long had you been wearing those clothes?

A. All day.

Q. Were you working that day?

A. No, I wasn't.

Q. Did you have a gun in your possession at all on that day?

A. No, I did not.

The Court: What day are you referring to?

Mr. Jones: January 24, 1963.

[fol. 93] By Mr. Jones:

Q. Have you ever been in a delicatessen at 301 12th Street, Southeast, known as Phil's Market?

A. No, I have not.

Q. But were you taken there at any time that day?

A. Yes, I was.

Q. Had you been there at any time previous to that?

A. No, I had not.

Q. Did you ever take any money from anyone in that delicatessen on that date?

A. No, I did not.

The Court: He is not charged with taking money from Phil's Market. He is charged with assault with intent to commit robbery.

Q. Did you try to take any money from anyone in that market on that date?

A. No, I did not.

Q. Did you commit this crime of assault with intent to rob upon Mrs. Korn?

A. Nope.

Q. Now, are you familiar with the High's Ice Cream Store on 7th Street?

A. Yes, I know where it's located.

Q. You know the location of the High's Store which these [fol. 94] witnesses have referred to in their testimony?

A. Yes.

Q. Have you ever been in there?

A. Yes.

Q. About how many times have you been there?

A. About two or three times.

Q. And what did you used to do when you went in there?

A. Get some ice cream or milk.

Q. Had you ever seen either of these two ladies that have testified from High's Ice Cream prior to December 27th, 1962.

A. Nope.

Q. Now, directing your attention to that date of December 27th, 1962, do you recall where you were at that time or what you were doing on that date?

A. No, I cannot.

Q. Do you recall whether you ever went into the High's Ice Cream Store on that date?

A. No, I can't say at that time, at the time.

Q. Could you tell the Court and the jury whether or not you committed this crime of robbery upon Mrs. McLeish in the High's Ice Cream Store on December 27th, 1962, at approximately 6:45 p.m.? Are you guilty of that crime?

A. No, I am not.

[fol. 95] The Court: No, that is not the way. The jury decides whether he is guilty. You may ask him whether he committed the robbery.

By Mr. Jones:

Q. Did you commit that robbery?

A. No, I did not.

The Court: Of course, you are pinpointing it to a particular moment, Mr. Jones. May I call your attention to the fact that I wouldn't do that if I were you.

Q. Did you commit that crime——

The Court: Did he commit the robbery.

Q. Did you commit that robbery about which these witnesses have testified with regard to High's Ice Cream Store?

A. No.
Q. And were you working on that date, if you recall?
A. No, I wasn't.
Q. When was the last date that you did work?
A. Around about November something, the middle part of November, last part of November.

The Court: You haven't worked at all since last November, is that it?
The Witness: November this past. I was in jail since then.
The Court: Not since November. Very well. He was [fol. 96] arrested in January.
Mr. Jones: That is correct.
The Witness: Yes, a month, a month and a half; something like that.

By Mr. Jones:

Q. Where was the last place that you worked?
A. Jim's Supermarket.
Q. And do you recall why you left that job?
A. Me and the manager couldn't get along?
Q. And directing your attention again to December 27, 1962, did you or did you not have a gun in your possession on that date?
A. No, I didn't.

Mr. Jones: Very well. Thank you.
The Court: Mr. Treanor.

Cross-examination.

By Mr. Treanor:

Q. Do you recall being arrested on the 24th of January?
A. Yes, I do.
Q. Do you remember about what time that was?
A. Around one, 1:30.

The Court: Speak up so everyone can hear you.
The Witness: Around one, 1:30.

Q. Where were you coming from when you were arrested?
[fol. 97] A. Home.
Q. Where is your home?

A. 1240 11th Street, Southeast.

Q. You were coming from your home?

A. Yes, I was.

Q. How long did it take you to get from your home to the place where you were arrested?

A. I don't know. I ain't never timed it.

Q. Well, approximately.

A. I couldn't say.

Q. How many blocks is it?

A. I really couldn't say.

Q. What is your address again?

A. 1240 11th Street, Southeast.

Q. 1240 11th?

A. Yes.

Q. Southeast. Well, that's only a few blocks, isn't it, from the corner of 11th Street and East Capitol? I'm sorry, the corner of 12th and East Capitol, isn't that just a few blocks from there?

A. Like I said, I ain't never——

Q. How long have you lived there?

A. About a year.

Q. You don't know how many blocks it is from your house [fol. 98] to the corner of East Capitol and 12th?

A. I have never counted it.

Q. Well, would you care to make a guess?

A. No.

Q. Would you say it was five blocks?

A. Like I said, I couldn't say what it was.

Q. Now, who was home when you left home?

A. My cousin and my aunt.

Q. What's your cousin's name?

A. Gertrude Brown?

Q. Gertrude Brown?

A. Uh-huh.

Q. And what's your anut's name?

A. Ruth Scott. Ruth something. I don't know her last name.

Q. Did you walk directly to the park from your home?

A. Uh-huh.

Q. Did you stop and talk to anyone along the way?

A. Nope.

Q. Did you go in any store along the way to buy anything or to look around?

A. Nope.

Q. You went directly toward the park then?

A. Yup.

[fol. 99] Q. Now, why did you start to run when you were in the alley between 12th and 11th Street?

A. I didn't run.

Q. You did not run?

A. Uh-huh.

Q. Did you hear Officer Demoro say that you went into the alley, then turned and ran?

A. Yes, I heard him.

Q. But that is not true?

A. Nope.

Q. Do you own a long overcoat, or did you then?

A. I have never owned an overcoat.

Q. Have you ever owned a three-quarter length car coat?

A. When I were six years old.

Q. Not since then?

A. Nope.

Q. On the 27th day of December 1963 do you recall whether you had a three-quarter length coat then?

A. Nope.

Q. What kind of a hat did you have last winter?

A. Last winter? I have a gray one like I have over at District Jail.

Q. Well, would you describe it to us?

A. It's a gray dress hat.

[fol. 100] Q. Did you at any time last winter own a cap with a beak on it and ear flaps?

A. Nope.

Q. On the 24th day of January what sort of shoes were you wearing?

A. These I have on.

Q. Boots?

A. Yes.

Q. What kind of pants did you have on that day?

A. A pair of gray slacks.

Q. And what color was the jacket?

A. Brown.

Q. What kind of a hat did you have on?

A. A gray hat.
Q. A gray hat?
A. Yes.
Q. Did you have that on when you were arrested?
A. Yes, I did.
Q. Now tell us what route you took from your house to the place where you were eventually arrested.
A. Went straight up N Street. I mean up 11th.
Q. Up 11th?
A. I started to go across the park, went across the park, went up 12th, then I cut through the alley from 12th over [fol. 101] toward 10th.
Q. How far did you have to walk up 11th from your home?
A. Like I told you before, I do not know. I haven't counted.
Q. And you can give us no idea of approximately how long it took you to leave your home until the time you got arrested?
A. No, I cannot.
Q. Would you say it was under an hour or do you think it might have been more than an hour?
A. It could have been under, it could have been over.
Q. You think it could have been over an hour?
A. It could have been under too.
Q. Well, what do you think it was?
A. I don't know. I don't own a watch.
Q. How far have you gone in school?
A. Seventh grade.
Q. Now, you heard Mrs. Korn say, did not not, that you came in and held a gun, pointed a gun at her?
A. Yes, I heard her.
Q. You didn't do that?
A. No.
Q. Did you go up that direction, up 11th—I'm sorry, up 12th Street? Were you up on 12th at all south of the park?
[fol. 102] A. I was up on 12th Street, northeast side.
Q. But not on the southeast side?
A. No, I did not.
Q. How about on 11th Street, Southeast?
A. I come up 11th Street leaving from home.
Q. Where were you going, incidentally?
A. I was going over my girl's house.

Q. Where does she live?
A. On 10th Street.
Q. Was she home that day?
A. I don't know. I didn't get there.
Q. Does she have a telephone?
A. Yes.
Q. You didn't call her before you left?
A. No, I did not.
Q. Now, you heard the police say, did you not, that you went into this alley between 12th and 11th?
A. Yes.
Q. And then you turned around?
A. Uh-huh.
Q. And were coming back and then you started to run and turned around again?
A. He said I started to run.
Q. Did you turn around in that alley?
[fol. 103] A. Yes.
Q. For what?
A. I was making up my mind must I go around there or go around my cousin's house.
Q. Where does your cousin live?
A. Over on 15th Street.
Q. All right. Now going back to the 27th day of December, do you recall where you were that day?
A. No, I cannot.
Q. You have thought about it, though? Have you tried to remember?
A. Yes, I tried to remember.
Q. Did you spend Christmas at home?
A. Yes, I was at home Christmas.
Q. When did you next go to work, or did you?
A. I didn't.

Mr. Treanor: Would the Court indulge me a moment, please?

(Pause.)

By Mr. Treanor:

Q. Are you the same Melvin Carl Jenkins who, on the 19th of July 1962, was convicted of larceny?

A. I don't know what date it was, but I was convicted for it.

[fols. 104-106] Mr. Treanor: I have nothing further.

The Court: Anything further?

Mr. Jones: Nothing further.

The Court: You may step down.

(Witness stepped down)

Mr. Jones: The defense rests, Your Honor.

* * * * * * *

[fol. 107] (At 12:30 p.m. trial stood in recess, to reconvene 1:45 p.m.)

AFTERNOON SESSION

The Deputy Clerk: United States vs. Melvin Jenkins. Mr. Treanor, Mr. Jones.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

CHARGE TO THE JURY

The Court: Ladies and gentlemen of the jury: What we have here is a very simple case that should not detain you long and in which you should have no difficulty in reaching a prompt decision one way or the other.

The defendant, Melvin Jenkins, is on trial on two charges. One charge, contained in the first count of the indictment, charges a robbery of an employee of High's Dairy Products Corporation in one of the High's Ice Cream stores on December 27, 1962. The second count charges an assault with intent to commit robbery on January 24th at a grocery store known as Phil's Market. The second count charges [fol. 108] not robbery but assault with intent to rob because the robbery there was not completed but, according to the Government's contention, the robber fled before completing

the robbery, and so the offense is known as assault with intent to commit robbery.

You will bring in a separate verdict on each of the two counts and in each instance your verdict should be either guilty or not-guilty.

All of you have served in other cases and therefore you are aware of the fact that it is my function and duty to instruct the jury concerning the rules of law that must govern the disposition of the case on trial. You are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

But you ladies and gentlemen of the jury are the sole judges of the facts and you must decide the facts yourselves on the basis, and solely on the basis, of the evidence introduced at this trial.

In addition to instructing the jury as to the law the Court has another function to perform, namely, to summarize the evidence, discuss and comment on the facts and on the evidence to the extent to which I deem it appropriate to do so. That is done, however, merely to aid and assist the jury and my summary of the evidence and my discussion and comments on the facts and on the evidence are not binding [fol. 109] on you, you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because you are the final judges of the facts. My instructions are binding on you only as concerns the law.

Let me summarize a few general principles of law applicable to all criminal cases, including, of course, this one. Those of you who have participated in trials of other criminal cases have become aware of these rules, but it is my duty to present them afresh to the jury in every case, even at the risk of wearisome repetition.

First—The fact that a defendant has been indicted is not in itself an indication of guilt because an indictment is merely the machinery and the procedure by which a defendant is brought before the Court and is placed on trial.

Second—Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to him throughout the trial until it is overcome by evidence.

Third—The burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves [fol. 110] beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

Proof beyond a reasonable doubt, however, does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty.

As its very name implies, by a reasonable doubt is meant a doubt based on reason and not just some whimsical speculation or some capricious conjecture.

I think I can explain the meaning of the words proof beyond a reasonable doubt in simple every day language. It simple means this. If after an impartial comparison and consideration of all the evidence you can say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such an impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defend- [fol. 111] ant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

You are the sole judges of the credibility of witnesses. In other words, it is for you, and for you alone, to determine whether to believe any witness and the extent to which any witness should be credited. In case there is any conflict in the testimony it is your function to resolve the conflict and to determine where the truth lies and what the facts were.

If you find that any witness willfully testified falsely as to any material fact concerning which the witness could not have reasonably been mistaken, then you are at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness or any part of that witness' testimony.

The defendant took the witness stand and testified as a

witness in his own behalf. It appeared on his cross-examination that he has a criminal record. While that fact is not any proof of guilt on the charges on which he is being tried, the law permits the jury to consider the fact that any witness who has a criminal record, if that be the fact, you have a right under the law to consider the defendant's criminal record as a help in determining whether he was a trustworthy witness when he took the witness stand and whether his testimony should be believed. You have a right [fol. 112] under the law, if you see fit to do so, to give less credance, less belief to a witness who has a criminal record than a person whose record is unblemished.

Now the first count, as I said to you before, charges robbery. Robbery is defined as follows in the District of Columbia Code of Laws:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery.

Now the crime of robbery, as I said before, is charged in the first count of the indictment and relates to the hold-up or alleged hold-up of the High's Ice Cream Store on December 27, 1962. Briefly let me summarize the evidence, but let me remind you, before I do so, what I said before at the opening of my remarks, that my summary of the evidence is intended only to help you, you must make your own decision on the basis of the evidence, my discussion is not binding on you. To decide what the facts were and whether the defendant is guilty or not is your function, your duty and your responsibility.

Now as to the first count of the indictment, Ruth McLeish, [fol. 113] one of the employees of the High's Ice Cream Store, testified that at about quarter of seven in the evening of December 27th of last year she was returning to the store after having been gone for her lunch hour. She saw a man standing in front of the store looking up and down the street. She then went into the store. A moment later, she testified, the defendant entered, pointed a gun at the other employee of the store, Ruth Hodges, and Ruth Hodges then pulled money out of the cash register and the robber said to

her, Just the bills, lady, not the change. And Ruth Hodges testified to the same effect and also that she gave him $38. Ruth McLeish identified this defendant as the man whom she saw standing on the street and then enter the store and hold up her co-worker. She testified that she recognized him again in the Commissioner's office on February 7th. Ruth Hodges testified that the defendant was the man who came in and pointed the gun at her.

Now the defense called an investigator, Mr. Francis Savage, who said that he telephoned Ruth Hodges and asked her concerning the matter. He further testified that Ruth Hodges said that she could not identify the man but that her co-worker, Mrs. McLeish, picked his picture out from a number of photographs furnished to her by the police.

Ruth Hodges was called back to the stand and she testified [fol. 114] that she did have a telephone conversation with Francis Savage, but she denied that she said she could not identify the man, but said that she told him that Mrs. McLeish got a better view of him and was better able to identify him.

The defendant took the witness stand and denied that he committed this robbery.

Now so much for the first count of the indictment. The second count of the indictment relates to Phil's Market and the crime charged there is assault with intent to commit robbery.

An assault is defined by law as an unlawful attempt or effort, with force and violence, to do injury to the person of another, coupled with the present apparent possibility of carrying out such an attempt. To point a gun at another person in a menacing or threatening manner or accompanied by any words that would justify the other person assuming that the weapon might be used against him constitutes an assault. If the assault is committed with the intention of committing robbery, then the offense becomes an aggravated form of assault known as assault with intent to kill—assault with intent to rob, rather. That was a slip of the tongue on my part. Assault with intent to rob.

Now in this case, in the case of the second count of the indictment, Sophie Korn, one of the two co-owners of Phil's [fol. 115] Market, testified that she was standing at the counter when the defendant came in and asked for four

pork chops. She directed the clerk to get and and weigh out the four pork chops. The defendant, according to her testimony, then pointed a gun at her and said, I want your money. She testified that she opened the cash register and he said, Put the money in the bag, and she testified that she started to do so. At that moment her husband came in and the defendant turned around and ran. She further testified that a few minutes later the police brought in a man and that she identified this man as the one who held her up and that was the defendant in this case. Her clerk, Joseph Davis, Jr., was called as a witness and he testified that this man came in and ordered some chops, that then he drew the gun and said he wanted money, and that Mrs. Korn was putting money into a paper bag when her husband came in and the man turned around and ran. A few minutes later, according to Joseph Davis, the man was brought back by a detective and again Joseph Davis identified the defendant as being that man.

Officer Demoro of the Police Department testified that he and his partner and a couple of uniformed men responded to an alarm over the radio and they planted themselves at a particular point on East Capitol and 12th Street and they observed the defendant breathing heavily, acting nervously [fol. 116] and running, and arrested him. They took him to the store. At first he refused to get out of the car. They ordered him to do it. They took him into the store and the officer testified that Mrs. Korn and Joseph Davis identified the defendant as the man who had just held up the store.

Mr. Korn testified that he came in while his wife was putting money in the bag and that the man who was in the store ran, but apparently Mr. Korn got only a fleeting glimpse of him and he cannot say for sure as to whether the defendant was the man.

The defendant again took the witness stand and denied that he attempted to rob Mrs. Korn.

It is for you to determine, ladies and gentlemen of the jury, what the fact was and where the truth lies, and in doing so you must use the same practical approach, the same ordinary common sense and the same intelligence that you would employ in determining any other important matter that you have occasion to decide in the course of your every day life.

You will bring in a separate verdict on each of the two counts of the indictment, Count 1, the robbery of the High's Ice Cream Store on December 27th; Count 2, assault with intent to commit robbery at Phil's Market on January 24th, 1963. In each instance your verdict should be either guilty or not guilty, and as you are well aware, your verdict should [fol. 117] be reached by unanimous vote.

• • • • • • •

[fol. 118] The Court: Ladies and gentlemen of the jury, the 12 regular jurors may now retire. Upon reaching the jury room you will first select a foreman from amongst yourselves, who will act as your chairman, preside over your deliberations and speak for you in returning your verdict, and then you will proceed to reach a verdict. Will the 12 regular jurors please follow the Marshal. Will the two alternate jurors please retain their seats for a moment.

(At 2:22 p.m. the jury retired to the jury room to deliberate.)

4:30 p.m.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Court: Mr. Foreman, the Court has received your note reading as follows:

> "The jury cannot come to a decision on both counts because of insufficient evidence."

Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

Now, I am not going to accept this. You have got to reach a decision in this case.

[fol. 119] You may resume your seat, Mr. Foreman.

Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume

your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations, please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has to be decided. That is all the evidence there is, that is all the evidence anybody can have. If I excuse you we have to try the case again with some other jury and they will [fol. 120] have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight.

(At 4:35 p.m. trial stood in recess, to reconvene May 28, 1963 upon return of jury.)

[fol. 121] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 208-63

[Title omitted]

Transcript of Proceedings—May 28, 1963

Washington, D. C.

The above cause came on for further trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury.

APPEARANCES:

For the Government: John H. Treanor, Jr., Esq., Assistant United States Attorney.

For the Defendant: Thomas R. Jones, Esq.

[fol. 122] COLLOQUY RE TESTIMONY OF MISS RUTH HODGES AND READING THEREOF BY REPORTER

10:00 a.m.

(The following proceedings were had out of the presence of the jury:)

The Deputy Clerk: Are there any preliminary matters?

Mr. Jones: Your Honor, in the case of United States vs. Melvin C. Jenkins, Criminal 208-63, the jury retired yesterday afternoon to deliberate over the verdict and late yesterday afternoon they sent in a note. Your Honor, I have prepared a proposed instruction in response to that note, which I would like to offer to the Court at this time.

The Court: I am not going to give them any instruction. However, I will see what you have prepared. (Pause.)

I am not going to give them any additional instructions at this time. I am going to deny your request.

11:00 a.m.

(The following proceedings were had out of the presence of the jury:)

The Court: Will counsel in the Jenkins case come forward, please.

Gentlemen, the Court has just received a note from the jury reading as follows:

"The jury requests the testimony of Ruth Hodges."

I presume they would want to have the testimony read. [fol. 123] I will bring in the jury for that purpose. I will excuse the Reporter to get his notes and we will suspend the case on trial, the Price case, for a few minutes while this is being done.

. . . . . .

The Court: You may bring in the jury.

(The jury resumed the jury box.)

[fol. 124] The Court: Mr. Foreman, the Court has received your note reading as follows:

"The jury requests the testimony of Ruth Hodges."

Accordingly, the Court has arranged to have the Reporter get his notes and I shall ask the Reporter to read the testimony of Ruth Hodges when she was called in behalf of the Government. She was recalled again by the defense. Do you want her testimony on both occasions or only on the occasion when she was called by the Government?

The Foreman: Well, I think when she was called by the Government would be sufficient.

The Court: If you wish, we can read her testimony on both occasions.

The Foreman: That would help a lot, sir.

The Court: First, I shall ask the Reporter to read the testimony that she gave when she was called by the Government.

(The record was read by the Reporter.)

The Court: Would you also like to have Ruth Hodges' testimony when she was recalled by the defense?

The Foreman: Yes, I would, Your Honor.

The Court: Very well, you may read that.

(The record was read by the Reporter.)

[fol. 125] The Court: Unless any one of you has any other questions—has any one of you any further questions that the Court can help you with? If not, you may retire again and resume your deliberations.

* * * * * * *

The Court: Ladies and gentlemen of the jury, you may retire again and resume your deliberations. The Court hopes that you will reach a verdict presently.

[fols. 126-127] VERDICT OF JURY

2:20 p.m.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Deputy Clerk: Will the Foreman please rise.
Mr. Foreman, has the jury agreed upon a verdict?
The Foreman: Yes, we have.
The Deputy Clerk: What say you as to the defendant, Melvin C. Jenkins, on Count 1 of the indictment?
The Foreman: Guilty.
The Deputy Clerk: What say you as to the defendant, Melvin C. Jenkins, on Count 2 of the indictment?
The Foreman: Not guilty.

* * * * * * *

[fols. 128-132] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 133] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,032

MELVIN C. JENKINS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Columbia

OPINION—Decided February 13, 1964

Mr. Robert R. Tiernan, with whom *Mr. Jerome H. Heckman* (both appointed by this court) was on the brief, for appellant.

Mr. David Epstein, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Frank Q. Nebeker* and *John H. Treanor,* Assistant United States Attorneys, were on the brief, for appellee. *Mr. B. Michael Rauh,* Assistant United States Attorney, also entered an appearance for appellee.

Before WILBUR K. MILLER, BURGER and WRIGHT, *Circuit Judges.*

PER CURIAM: Evidence for the Government showed that Jenkins entered a store and, at gun point, forced an em- [fol. 134] ployee to give him the contents of the cash drawer. Testifying in his own behalf, Jenkins denied the robbery, said he could not remember where he was on the day in question, but admitted having been in the store on several occasions. Cross-examination disclosed a criminal record which, of course, went to his credibility. Found guilty by the jury, he appeals.

The principal claims of error advanced by Jenkins are that the trial judge gave a coercive instruction and improperly commented on the evidence. Significantly, the appellant did not object at the time and protests for the

first time on appeal. Regardless of that, we have considered the matter and have concluded that, viewed in the context of the whole charge, the challenged statements of the trial judge do not require reversal.[1]

---

[1] The court's statements to the jury did not in any sense purport to be the charge under *Allen* v. *United States*, 164 U. S. 492 (1896), to which our dissenting colleague applies colorful words such as "dynamite" and "nitroglycerin." They were no more than the judge's response to a jury which reported it was "deadlocked" after only very brief deliberations. We see no basis whatever for characterizing these statements as coercive, especially as the jury did not reconvene and resume its deliberations until the following day.

Affirmed.

WRIGHT, *Circuit Judge, dissenting*: Jenkins was convicted[1] of the robbery of $38.00 from a High's Dairy Products store and sentenced to serve three to ten years. [fol. 135] I believe this conviction should be reversed because of two trial court errors: (1) coercive instruction to the jury, and (2) improper comment on the evidence during the charge.

I

The court began its charge to the jury in this case with the following words: "Ladies and gentlemen of the jury: What we have here is a very simple case that should not detain you long and in which you should have no difficulty in reaching a prompt decision one way or the other." Nevertheless, after two hours of deliberation, the jury sent the court a note reading: "The jury cannot come to a decision on both counts because of insufficient evidence." Thereupon the court gave the jury additional instructions,

---

[1] The indictment was in two counts: (1) robbery, 22 D.C. Code § 2901 (1961), and (2) assault with intent to commit robbery, 22 D.C.Code § 501 (1961). The defendant was convicted on Count 1.

including: "Now, I am not going to accept this. You have got to reach a decision in this case." [2]

---

[2] The complete additional instruction reads:

"The Court: Mr. Foreman, the Court has received your note reading as follows:

" 'The jury cannot come to a decision on both counts because of insufficient evidence.'

"Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

"Now, I am not going to accept this. You have got to reach a decision in this case.

"You may resume your seat, Mr. Foreman.

"Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

"Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations, please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

"It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

"I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has to be decided. That is all the evidence there is, that is all the evidence anybody can have.

[fol. 136] After further deliberation, the jury brought in a verdict of guilty on Count 1 and not guilty on Count 2. It is my view that the jury may well have concluded that the judge's additional instruction meant what it said: "You have got to reach a decision in this case"—that they were required to bring in a verdict. I also believe that, under the circumstances, the verdict as returned was, in all probability, a compromise.

The charge to the jury given here is more coercive than anything I have heard or read in 25 years of exposure to criminal jury trials. Even the 67-year-old *Allen*[3] charge, now condemned as "the dynamite charge,"[4] does not go [fol. 137] so far in coercing the jury. At least in the *Allen* charge, after the jury is told that it is its duty to reach a verdict, the words "if [you] can conscientiously do so" are added. Here the jury was simply told flat out: "You have got to reach a decision in this case."

There is no requirement in law that a jury agree. As a matter of fact, a hung jury can be a safeguard to liberty. The urge to convict in times of public hysteria may be very

---

If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight."

[3] See *Allen* v. *United States*, 164 U.S. 492 (1896).

[4] "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. There is small, if any, justification for its use." *Green* v. *United States*, 5 Cir., 309 F.2d 852, 854 (1962). The "dynamite charge" is also called the "nitroglycerin charge," *Huffman* v. *United States*, 5 Cir., 297 F.2d 754, 759 (1962), the "third degree instruction," *Leech* v. *People*, 112 Colo. 120, 146 P.2d 346, 347 (1944), and the "shotgun instruction," *State* v. *Nelson*, 63 N.M. 428, 321 P.2d 202, 204 (1958). This court recently noted that "[t]he 'dynamite charge' is intended to 'encourage' jurors to agree." *Campbell* v. *United States*, —— U.S.App.D.C. ——, ——, 316 F.2d 681, 681 n.1 (1963), and see also cases there cited, especially *Green* v. *United States*, *supra*, and the authorities cited 309 F.2d at 854-855 n.3.

great. And the common law recognizes that, even where there is a failure of proof, often only the uncommon man can stand against this pressure. Thus, by having a jury of twelve, with a unanimous individual vote required, a measure of protection is afforded.

The majority's approval of this coercive charge is also in conflict with two decisions of the Fifth Circuit Court of Appeals. In *Powell* v. *United States,* 5 Cir., 297 F.2d 318, 320 (1961), the instruction, "If you follow the principles of law given you by the Court and if you recall the evidence in this case you ought to be able to agree on a verdict," was held sufficiently coercive to require reversal of the conviction. And in *Green* v. *United States, supra* Note 4, 309 F.2d at 855, the court held that the instruction, "* * * it is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment [fol. 138] because the rule is that the majority will have better judgment than the mere minority * * *," far exceeded permissible limits. The instruction "prejudiced the right of an accused to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors." *Id.* at 856.

A comparison of the objectionable portion of the charge given here with the charges in the *Powell* and *Green* cases demonstrates that the charge in this case was by far the most coercive. Yet in both those cases the Fifth Circuit held that the giving of such a charge was error requiring reversal of the convictions.

II

The second trial court error concerns the inaccurate and incomplete summary of a key prosecution witness' testimony in the charge. On cross-examination the witness, Mrs. Hodges, testified as follows:

[By defense counsel.]

"Q. Do you recall having a conversation with a Mr. Savage of the Legal Aid Agency on April 9th, 1963?

"A. No.

"Q. Do you recall an investigator of the Legal Aid Agency talking to you and asking you if you knew anything about this case?

"A. No.

"The Court: What is your answer?
"The Witness: No."

And also:

[By defense counsel.]

"Q. Isn't it true, Mrs. Hodges, that you were actually unable to identify this defendant on a prior occasion?

"The Court: You will have to specify the prior occasion. You can't ask enigmas like that.

"Q. Was there a prior occasion when you were unable to identify this defendant?

[fol. 139] "The Court: No, no; you will have to make clear what you are referring to. You cannot mystify a witness, Mr. Jones.

"Mr. Jones: Very well, Your Honor, I have no further questions at this time."

A Legal Aid investigator, Mr. Savage, was called and testified that he had indeed interviewed Mrs. Hodges, by phone, and that she told him "she was not able to identify the man." On being recalled, Mrs. Hodges admitted that she had spoken to the investigator as he had testified. Therafter she was asked:

[By defense counsel]

"Q. But the question is, did you tell him that you couldn't identify him [the defendant]?

"A. Yes."

Apparently not satisfied with the answer, the court interrupted at this point to take over the questioning of the witness:

"The Court: Did you tell Mr. Savage that you could not identify this defendant as being the man who held up the store? Did you tell him that? Do you understand that?

"The Witness: I told him that I could his face part, but that Mrs. McLeish got a better description of him.

"The Court: We are asking you whether you told Mr. Savage that you could not identify this defendant. Did you tell him that?

"The Witness: Well, no, I didn't tell him."

In summing up this portion of the evidence, the trial court did not mention the answer Mrs. Hodges had given to defense counsel, but only the answer elicited by the court itself.

> "Now the defense called an investigator, Mr. Francis Savage, who said that he telephoned Ruth Hodges and asked her concerning the matter. He further testified that Ruth Hodges said that she could not identify the [fol. 140] man but that her co-worker, Mrs. McLeish, picked his picture out from a number of photographs furnished to her by the police.
>
> "Ruth Hodges was called back to the stand and she testified that she did have a telephone conversation with Francis Savage, but she denied that she said she could not identify the man, but said that she told him that Mrs. McLeish got a better view of him and was better able to identify him."

A judge's discretion to comment on the facts "is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. * * * This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; * * *." *Quercia* v. *United States*, 289 U.S. 466, 470 (1933). See also *Wabisky* v. *D. C. Transit System, Inc.*, —— U.S.App.D.C. ——, —— F.2d —— (No. 17,720, decided December 12, 1963).

The court's instruction here was not only misleading, it was also one-sided. In a simple criminal case, there is little excuse for the trial court's exercising its common law right to comment on the testimony of witnesses. The jury is in as good a position as the judge, not only to remember their testimony, but to appraise it. So, when a trial judge undertakes the risk of trenching of the function of the jury, he must do so with the certain knowledge that his actions will be subjected to strict scrutiny. Here the summation by the court of the testimony on the identifying witness, Mrs. Hodges, is indefensible, not only from the standpoint of accuracy but from the standpoint of fairness as well.

I respectfully dissent.

[fol. 141] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,032

Crimial 208-63

MELVIN C. JENKINS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, BURGER AND WRIGHT, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Separate dissenting opinion by Circuit Judge Wright.

[fols. 142-153] Petition for rehearing en banc covering 12 pages filed February 28, 1964 omitted from this print. It was denied, and nothing more by order. April 3, 1964.

[fols. 154-156] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 208-63

[Title omitted]

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, AND MCGOWAN, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING EN BANC—
April 3, 1964

On consideration of appellant's petition for rehearing *en banc*, it is

Ordered by the Court *en banc* that appellant's aforesaid petition is hereby denied.

Per Curiam.

Chief Judge BAZELON, and Circuit Judges FAHY, WASHINGTON and WRIGHT would grant appellant's petition for rehearing *en banc*.

[fol. 157] Clerk's Certificate to Foregoing transcript omitted in printing.

[fol. 158] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1963

No.

MELVIN C. JENKINS, Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—May 6, 1964

Upon consideration of the application of counsel for petitioner

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 2nd, 1964.

Earl Warren, Chief Justice of the United States

Dated this 6th day of May, 1964.

[fol. 160] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1964

Case No.

MELVIN C. JENKINS,

v.

U.S.

To: The Chief Justice.

Application for further extension of time to file cert. You have heretofore given him a 29 day extension until today and he asks for one more day or until June 3rd.

Extension Requested: One day—June 3rd.

Reason: Other Commitments.

OK

E.W.

[fol. 160] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 107 Misc.

MELVIN C. JENKINS, Petitioner,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —December 14, 1964

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 761 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 760090 815

FILE COPY

PETITION NOT PRINTED
RESPONSE NOT PRINTED

Office-Supreme Court, U.S
FILED
FEB 12 1965
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 761

MELVIN C. JENKINS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

M. MICHAEL CRAMER
H. THOMAS SISK
Counsel for Petitioner
McLachlen Bank Building
Washington, D.C.

Of Counsel:

DAVID B. ISBELL
National Capital Area
Civil Liberties Union,
1101 Vermont Avenue, N.W.
Washington, D.C.

INDEX

SUBJECT INDEX

BRIEF FOR PETITIONER

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Questions Presented	3
Statement	4
Argument:	
I. The Rule of *Allen* v. *United States*, 164 U.S. 492, Is Unconstitutional Under the Fifth and Sixth Amendments to the Constitution of the United States	6
II. The United States Court of Appeals for the District of Columbia Incorrectly Applied the Rule of *Allen* v. *United States*, 164 U.S. 492, in This Case	17
Conclusion	20

CITATIONS

CASES:

Allen v. *United States*, 164 U.S. 492	3, 6-11, 16-20
Allis v. *United States*, 115 U.S. 117	7
Andres v. *United States*, 333 U.S. 740	6
Andrews v. *United States*, 309 F. 2d 127 (C.A. 5, 1962)	10
Brasfield v. *United States*, 272 U.S. 448	15, 16
Brown v. *State*, 127 Wis. 193, 106 N.W. 536	14
Burton v. *United States*, 196 U.S. 283	15, 16
Campbell v. *United States*, 115 U.S. App. D.C. 30, 316 F. 2d 681	6
Chase v. *State*, —— Alaska ——, 369 P. 2d 997	15
Commonwealth v. *Tuey*, 62 Mass. (8 Cush.) 1	7

Page

Counts v. *Commonwealth*, 187 Va. 744, 119 S.E. 2d 79 15
Eikmeier v. *Bennett*, 143 Kan. 888, 57 P. 2d 87 13
Green v. *United States*, 309 F. 2d 852 (C.A. 5, 1962) 6, 8, 10
Hannon v. *State*, 70 Wis. 448, 36 N.W. 1 14
Hodges v. *O'Brien*, 113 Wis. 97, 88 N.W. 901 14
Huffman v. *United States*, 297 F. 2d 754 (C.A. 5, 1962), cert. denied, 370 U.S. 955 ..... 9, 10, 16
Leech v. *People*, 112 Colo. 120, 146 P. 2d 346 14
McCarthy v. *Odell*, 202 App. Div. 784, 195 N.Y.S. 80 15
Meadows v. *State*, 182 Ala. 51, 62 So. 737 15
Middlestate Utility Co. v. *Incorporated Tel. Co.*, 222 Iowa 1275, 271 N.W. 180 14
Orr v. *State*, 269 Ala. 696, 111 So. 2d 627 15
Peterson v. *United States*, 213 Fed. 920 (C.A. 9, 1914) 11
Pierce v. *Pierce*, 38 Mich. 412 13
Powell v. *United States*, 297 F. 2d 318 (C.A. 5, 1961) 9, 19, 20
Rogers v. *United States*, 289 F. 2d 433 (C.A. 4, 1961) 8, 9, 18, 20
Secor v. *State*, 118 Wis. 621, 95 N.W. 942 ..... 14, 15
State v. *Evans*, 88 Ariz. 364, 356 P. 2d 1106, cert. denied, 371 U.S. 835 11
State v. *Fisher*, 23 Mont. 540, 59 Pac. 919 15
State v. *Moon*, 20 Idaho 202, 117 P. 2d 757 14
State v. *Nelson*, 63 N. Mex. 428, 328 P. 2d 202 14
State v. *Pierce*, 178 Iowa 417, 159 N.W. 1050 14
State v. *Thomas*, 86 Ariz. 161, 342 P. 2d 197 ..... 11, 12
State v. *Voeckell*, 69 Ariz. 145, 210 P. 2d 972 12
United States v. *Kahaner*, 317 F. 2d 459 (C.A. 2, 1963), cert. denied, 375 U.S. 836 11
United States v. *Smith*, 303 F. 2d 341 (C.A. 4, 1962) 9

Page

CONSTITUTIONAL PROVISIONS AND STATUTES:

Amendments to U.S. Constitution, Fifth & Sixth 2, 3, 6, 11, 16
D.C. Code, Section 22-501 (1961 ed.) 3, 4
D.C. Code, Section 22-2901 (1961 ed.) 3, 4
Rule 31(a), Federal Rules of Criminal Procedure 3, 6

MISCELLANEOUS:

Tulane Law Review, 34:214, "Instructions by Trial Courts Coercing Agreement Among Jurors" 8
U. Chi. Law Rev. 31:386, "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'" 8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 761

MELVIN C. JENKINS,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia is reported at —— U.S. App. D.C. ——, 330 F. 2d 220 (R. 53).

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 13, 1964 (R. 53, 60), and a petition for rehearing en banc was denied on April 3, 1964 (R. 61). On May 6, 1964, by order of Chief

Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including June 2, 1964 (R. 62). On June 2, 1964, by order of Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to and including June 3, 1964 (R. 62). The petition for writ of certiorari was filed on June 3, 1964, and was granted on December 14, 1964 (R. 63). The jurisdiction of this Court rests on 28 U.S.C. 1254.

Constitutional Provisions and Statutes Involved

Amendments to the Constitution of the United States:

Amendment 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes:

D.C. Code, Section 22-501 (1961 Edition) *Assault with intent to kill, rob, rape, or poison:*

"Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years. (Mar. 3, 1901, Stat. 1231, ch. 854, section 803)"

D.C. Code, Section 22-2901 (1961 Edition) *Robbery:*

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, section 810)"

Rule 31. Federal Rules of Criminal Procedure:

"(a) *Return.* The verdict shall be unanimous. * * *"

Questions Presented

1. Whether the rule of *Allen* v. *United States*, 164 U.S. 492, is constitutional under the Fifth and Sixth Amendments to the Constitution of the United States.

2. Whether the United States Court of Appeals for the District of Columbia correctly applied the rule of *Allen* v. *United States*, 164 U.S. 492, in this case.

Statement

Petitioner was indicted in the United States District Court for the District of Columbia on two counts: (1) robbery, in violation of 22 D.C. Code, Sec. 2901, and (2) assault with intent to commit robbery, in violation of 22 D.C. Code, Sec. 501 (R. 54). After trial by jury, petitioner was found guilty, under count one of the indictment, of robbing a High's Dairy, located in Washington, D.C., of $38.00 (R. 54). After judgment of conviction was entered, petitioner was sentenced to imprisonment for a period of three to ten years (R. 54).[1]

The Court of Appeals affirmed the judgment of conviction of February 13, 1964, Judge Skelly Wright dissenting (R. 60). A petition for rehearing en banc was filed and denied by that Court on April , 1964, Judges Bazelon, Fahy, Washington and Wright in favor of granting the petition (R. 61).

At the conclusion of the trial on May 27, 1964, the jury began deliberating at 2:22 p.m. and was recalled to the courtroom at 4:30 p.m. after sending a note to the trial judge which read as follows (R. 48):

> The jury cannot come to a decision on both counts because of insufficient evidence.

The trial judge then gave a supplemental instruction to the jury, as follows (R. 48-49):

> Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

---

[1] Petitioner is presently serving the above-mentioned sentence at Lorton Reformatory, Lorton, Virginia.

Now, I am not going to accept this. You have got to reach a decision in this case.

You may resume your seat, Mr. Foreman.

Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has got to be decided. That is all the evidence there is, that is all the evidence anybody can have. If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight.

The following day, at 11:00 a.m., the trial judge called counsel to the bench and informed them that the jury requested the testimony of one of the witnesses (R. 50, 51). The jury was brought back into the courtroom, at which time the testimony of the witness was read to them by the court reporter. They again retired to the jury room and at 2:20 p.m., the jury rendered the verdict mentioned above (R. 51, 52).

ARGUMENT

I.

The Rule of Allen v. United States, 164 U.S. 492, Is Unconstitutional Under the Fifth and Sixth Amendments to the Constitution of the United States.

The Fifth and Sixth Amendments guarantee every person charged with an indictable crime the right of due process of law and trial by a fair and impartial jury. Implicit in these guarantees is the right of an individual defendant to have a jury disagree.[2] The Allen charge infringes upon this right as its very purpose is to facilitate agreement among jurors. *Green* v. *United States*, 309 F. 2d 852, 854 (C.A. 5, 1962); *Campbell* v. *United States*, 115 U.S. App. D.C. 30, 316 F. 2d 681, fn. 1. It is based on a fallacious legal principle that some jury at some time should convict or acquit. Thus, the Allen charge is in direct conflict with an individual's fundamental constitutional guaranties.

---

[2] See: Federal Rules of Criminal Procedure, 28 U.S.C., Rule 31(a) "*Return.* The verdict shall be unanimous. * * * " See also: *Andres* v. *United States*, 333 U.S. 740.

In *Allen* v. *United States*, 164 U.S. 492, this Court sustained a long established practice[3] and laid down the following guidelines for a supplemental charge to be given to a deadlocked jury (164 U.S. at 501):

> * * * that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. * * *

Certainly the purpose behind the Allen charge is an advantage to both sides as it saves the time and expense of numerous trials. However, this is a legitimate or proper purpose only if the change in the minority jurors' opinion is due to a reasoned change in their views of the evidence. But, despite the good intentions behind the Allen charge, the great danger with it is that the effect it has on the jury cannot be ascertained. And, since it is always directed to the minority, it may cause the minority jurors to substitute

---

[3] Cf. *Commonwealth* v. *Tuey*, 62 Mass. (8 Cush.) 1 (1851); *Allis* v. *United States*, 155 U.S. 117.

the view of the majority for their own. If this is done, of course, the verdict is improper and violates the defendant's constitutional rights because the jury has not reached a unanimous verdict but only a majority verdict. Experience has established that even if the Allen charge has served its avowed purpose of saving the time and expense of new trials, the decision has resulted in the erosion of individual constitutional rights of defendants due to its very nature of coercion. That this is true is perhaps best shown by considering decisions of the lower courts which have had occasion to consider, criticise and limit equivalent charges.[4]

The Federal courts, while duty bound to uphold the Allen charge, have shown this apprehension of it by reversing convictions where the supplemental instructions varied, even in the slightest, from it. For example, in *Green* v. *United States*, the Court held that a charge containing the statement that "the majority will have better judgment than the mere minority" far exceeded "the permissible limits of the Allen charge" (309 F. 2d at 855). The Court pointed out that there is no legal rule that the majority should distrust their judgment and that such a charge leads the minority to believe that they should accede to the majority for no other reason than that. This, the Court said, disregards the historical rule that a single juror has a right to stick to his conscientious opinions.

Likewise, in *Rogers* v. *United States*, 289 F. 2d 433 (C.A. 4, 1961), a conviction was reversed because the trial judge gave an Allen-type charge but failed to include the ameliorating admonition that no juror could yield his conscientious conviction. The Fourth Circuit stated that the Allen

[4] See: "Deadlocked Juries and Dynamite: A Critical Look at the 'Allen Charge'," U. Chi. Law Rev. *31*:386 (1964); and "Instructions by Trial Court Coercing Agreement Among Jurors," Tulane Law Rev. *34*:214 (1951).

charge, itself, "approaches the ultimate permissible limits" (289 F. 2d at 435). That same Court again reversed a conviction, in *United States* v. *Smith*, 303 F. 2d 341 (C.A. 4, 1962), where the ameliorating admonition was given, but after the statement that the minority should "swallow their views and attempt to agree with the majority" (303 F. 2d at 343). The Fourth Circuit reiterated that; "(u)naccented and unembellished, the Allen charge is quite bold enough" (303 F. 2d at 343).

And, in *Powell* v. *United States*, 297 F. 2d 318 (C.A. 5, 1961), a conviction was reversed because the trial judge embellished on the Allen charge with such phrases as "this jury is just as competent as the next jury"; "no credit will be due a juror who stands up in a spirit of pure stubbornness"; and, "this jury ought to be able to reach a verdict in this case." The Fifth Circuit found no authority for the trial court to go beyond the wording set forth in the *Allen* case. The Court felt that because the trial judge had done so, the jurors might have been induced to agree to a verdict by fear that a failure to do so would reflect upon their intelligence or integrity.

However, in *Huffman* v. *United States*, 297 F. 2d 754 (C.A. 5, 1962), *cert. denied*, 370 U.S. 955, decided approximately a year after *Powell*, the Court affirmed even though the trial judge embellished on the Allen charge. A comparison of the charges in the two cases shows that the embellishment in *Huffman* was far greater than in *Powell*.[5] The courts have not been consistent in their approach to

[5] The dissenting opinion in *Huffman* points out the manifest unfairness of the decision as compared to *Powell*. Judge Brown states that the only reason that reversal was not granted in *Huffman* was that no objection was made to the Allen charge, as was the case in *Powell*. Petitioner submits that, if *Allen* constitutes the constitutionally permissible limits, no failure to object can waive the violation of due process.

this problem. Indeed, Judge Brown, dissenting in *Huffman*, argued that the courts ought to, at least, attempt to be consistently fair.

Judge Brown went beyond pointing out that unfairness arises due to confusion between the decisions because of the necessity of applying the law to the facts in each case. He argued that the Allen charge is *per se* unfair and should no longer be used. His rationale as to why the charge in *Huffman* was erroneous is applicable here.

The dissent in *Huffman* points out that the charge was based upon a basic misapprehension that criminal cases must end with a verdict of guilty or not guilty; overlooked the fact that a jury's failure to agree is a momentary victory, at least, for the defense and an end to the trial; and, that once the charge is given the jury was no longer free but was influenced by the judge's statement that it was their duty as citizens and jurors to agree. Judge Brown states (297 F. 2d at 759):

> * * * There is no longer any place for the Allen charge. For good reason it has acquired its description as the "dynamite charge" (variously called the nitroglycerine charge) at the hands of the bar. * * * I think a mistrial from a hung jury is a safeguard to liberty.

In *Andrews* v. *United States*, 309 F. 2d 127 (C.A. 5, 1962), a further refinement was made. There, the question was whether the trial judge gave the Allen charge too quickly—one hour and five minutes after the jury had begun deliberations; the court upheld the conviction. Judge Wisdom's dissenting opinion declared that the Allen charge causes "more trouble than worth" (309 F. 2d at 129). The nature of the confusion that has arisen in this area is well shown by *Green* v. *United States*, 309 F. 2d 852 (C.A. 5, 1962). There, after *Andrews*, the trial judge had informed the jury

before retiring to render its verdict that the minority should listen to the majority and should view its opinion with some doubt. The Fifth Circuit, after deciding that the sole purpose of the Allen charge is to "blast loose a deadlocked jury" (309 F. 2d at 854) stated that "(t)here is small, if any, justification for its use and no justification for its coercive use" (309 F. 2d at 854).[6] The Constitutional guarantees of due process and a fair and impartial jury cannot be circumscribed by creating a new right of courts to "blast loose" a jury that has disagreed.

In *Peterson* v. *United States*, 213 Fed. 920 (C.A. 9, 1914), a conviction was reversed where the trial judge, in a supplemental instruction, placed too much emphasis on the cost of a trial (the case had been tried twice), and informed the jury that justice required the case to be brought to an end. The Court of Appeals said that the language used "is plainly coercive in its general spirit and tendency" (213 Fed. at 924).

State courts have also wrestled with the question whether the Allen charge—or similar language—is coercive on its face. And few States have found such charges totally wanting.

In *State* v. *Thomas*, 86 Ariz. 161, 342 P. 2d 197, the Supreme Court of Arizona considered language almost identical to that in *Allen* and a problem identical to the one now before this Court, and said (342 P. 2d at 200):[7]

---

[6] In *United States* v. *Kahaner*, 317 F. 2d 459 (C.A. 2, 1963), *cert. denied*, 375 U.S. 836, 926, that Circuit recognized its disagreement with the Fifth Circuit's application of the Allen charge. See fn. 18, 317 F. 2d 484. In *Kahaner*, a conviction was upheld after the Allen charge was given a second time at the request of the jury.

[7] See and compare: *State* v. *Evans*, 88 Ariz. 364, 356 P. 2d 1106, *cert. denied*, 371 U.S. 835.

> This instruction has been before us four times. When and wherever its use is called into question it must stand or fall upon the facts and circumstances of each particular case. It has given, and we believe each use will give us, harassment and distress in the administration of justice. No rule of thumb can circumscribe definite bounds of when and where, or under what circumstances it should be given or refused.
>
> It now appears that its continued use will result in an endless chain of decisions, each link thereof tempered and forged with various facts and circumstances and welded with ever-changing personalities of the appellate court. This is not in keeping with sound justice and the preservation of human liberties and security. We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court.

The *Thomas* case overruled *State* v. *Voeckell*, 69 Ariz. 145, 210 P. 2d 972, where the Arizona Supreme Court permitted an Allen-type charge. The dissenting opinion of Justice Udall in the *Voeckell* case was impressive and undoubtedly influenced the later result in *Thomas*. He said (210 P. 2d at 978, 979):

> * * * Inasmuch, however, as it is a matter of first impression in this jurisdiction I strongly feel that the Court, at this crossroad, has taken the wrong path, and that the approval of its use now and in the future is a step backward rather than forward in the fair and impartial administration of justice.
>
> I agree with defense counsel that after hearing this instruction each minority juror no doubt reasoned thusly to himself:

"The majority think he is guilty; the Court thinks I ought to agree with the majority so the Court must think he is guilty. While the Court did not tell me to surrender my conscientious convictions, he told me to doubt *seriously* the correctness of my own judgment. The Court was talking directly to me, since I am the one who is keeping everyone from going home. So I will have to change my vote."

* * * * *

In my opinion the giving of the instruction complained of unfairly tipped the scales of justice against this defendant as it had a highly coercive effect upon the jury. Furthermore I am convinced that if this instruction under similar circumstance comes into general use in the trial courts of this state it will more frequently than not result in miscarriages of justice.

The courts are ever alert to curb "third degree" methods by peace officers against those accused of crime, hence it becomes all the more necessary that the trial court itself refrain from any act, such as the giving of last minute "advice" that in Colorado at least has earned the sobriquet of "third degree instruction." The Supreme Court of Michigan in speaking of acts of jury coercion made the sage statement: "Every attempt to drive men into agreement which they would not have reached freely is a perversion of justice." *Pierce* v. *Pierce*, 38 Mich. 412.

And, in *Eikmeier* v. *Bennett*, 143 Kan. 888, 57 P. 2d 87, 92,[8] the Kansas Supreme Court said:

---

[8] See annotation in 19 A.L.R. 2d 1257, 1258, " * * * the principles or considerations governing the propriety of verdict-urging instructions in civil cases appear to be essentially the same as they are with respect to criminal trials, the courts having rarely, if ever, suggested any considerations as clearly differentiating the two kinds of trials in this respect.".

> * * * To say to a minority that they should reexamine their views in the light of the opinion held by the majority, without putting a like duty on the majority * * * is wrong. The minority may be right and the majority wrong. Until the legislature provides for verdicts by definite majority of the jury, the court, by additional instruction, should not suggest, even faintly, that the opinion of the minority is to be controlled by that of the majority (57 P. 2d at 92).

Courts in other states while not wholly rejecting the Allen charge have treated it unkindly. In Colorado it is called the "third-degree instruction," *Leech* v. *People,* 112 Colo. 120, 146 P. 2d 346; in New Mexico, the "shot-gun instruction," *State* v. *Nelson,* 63 N. Mex. 428, 328 P. 2d 202. Further, the courts in Idaho, Iowa and Wisconsin have discouraged the use of the charge. *State* v. *Moon,* 20 Idaho 202, 117 P. 2d 757; *State* v. *Pierce,* 178 Iowa 417, 159 N.W. 1050; *Middlestate Utility Company* v. *Incorporated Telephone Company,* 222 Iowa 1275, 271 N.W. 180; *Hannon* v. *State,* 70 Wis. 448, 36 N.W. 1; *Hodges* v. *O'Brien,* 113 Wis. 97, 88 N.W. 901; *Secor* v. *State,* 118 Wis. 621, 95 N.W. 942; *Brown* v. *State,* 127 Wis. 193, 201, 106 N.W. 536, 539.

In *State* v. *Pierce, supra,* an otherwise properly given Allen-type charge brought about a reversal because the jury reacted too quickly to it. The Supreme Court of Iowa was concerned that the charge might have incorrectly influenced the jury. In reversing, the Court said (159 N.W. at 1055):

> The rule above stated shows on its face how difficult it is to apply it with safety to the rights of the parties. That it is the one which our holdings compel does not obviate its dangers. Therefore, though its wording is technically correct and has often been approved, it will

be better not to give it unless it be in an extreme case, and we suggest that where given it be in language less likely to have a coercive effect upon the mind of the average juror.

In *Counts* v. *Commonwealth,* 137 Va. 744, 119 S.E. 79, the Supreme Court of Virginia found that the trial court's statement to the jury that the minority should attempt to reconcile their views with the majority was coercive and reversed.

State v. *Fisher,* 23 Mont. 540, 59 Pac. 919, involved a reversal of a conviction on the ground that the trial judge, in his supplemental charge, said: "Feeling as I do about the case I see no reason for the jury to disagree and put the county to a large expense." See also: *Orr* v. *State,* 269 Ala. 696, 111 So. 2d 627; *Meadows* v. *State,* 182 Ala. 51, 62 So. 737; *Secor* v. *State, supra; McCarthy* v. *Odell,* 202 App. Div. 734, 195 N.Y.S. 80.

At the other extreme, one finds cases such as *Chase* v. *State,* —— Alaska ——, 369 P. 2d 997, where the Alaska Supreme Court upheld a conviction in a case where the Allen charge was given after the trial judge had determined that the jury was voting for conviction eleven to one. Compare *Burton* v. *United States,* 196 U.S. 283; *Brasfield* v. *United States,* 272 U.S. 448, where the identical practice was condemned.

When an opinion of this Court permits confusion such as this, justice is not being served. That the courts, both state and federal, have been concerned with whether an Allen-type instruction causes a juror to give up his belief to that of the majority solely for the purpose of reaching an agreement, is made obvious by reading the foregoing cases. A slight change of language, a slight difference in the time the charge was given, or a combination of slight

changes of both, have all caused errors requiring reversal. Even in this Court there has been difficulty with the Allen charge; in *Burton* v. *United States, supra,* and in *Brasfield* v. *United States, supra.*

The disrepute in which the Allen charge has come to be held can be seen in its popular designation as the "dynamite charge." Perhaps this is due in part to the fact that the charge is given for the purpose of expediency. It is respectfully urged that the time has come for this Court to reassess the rule of *Allen* v. *United States* for the purpose of determining whether its coercive effect is not in derogation of the constitutional rights and protections provided in the Fifth and Sixth Amendments. The rationale as to why the very purpose of the Allen charge is contrary to constitutional rights and is *per se* coercive and improper was set forth by Judge Brown in his dissent in *Huffman* v. *United States, supra,* as follows, and appears to best express the body of judicial thinking in this area:

> In the final analysis the Allen charge does not make sense. All it may rightfully say is that there is a duty to accept the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to decide, it is legally incorrect and an interference with that rightful independence.
>
> The time has come I think to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great (297 F. 2d at 759).

II.

The United States Court of Appeals for the District of Columbia Incorrectly Applied the Rule of Allen v. United States, 164 U.S. 492, in This Case.

The decision of the United States Court of Appeals for the District of Columbia in this case is an interpretation of *Allen* v. *United States,* 164 U.S. 492, and is not in accordance with the rule of that case or in concord with the interpretations of that rule as enunciated by other Circuits.

In the instant case, the jury deliberated for approximately two hours when it returned to the courtroom and informed the trial judge that it could not agree on either count because of "insufficient evidence" (R. 48). The trial judge then gave the jury what amounted to a supplemental charge which only could have had the effect of intimidating and coercing the jury into agreement. The judge's remarks, in pertinent part, are:

> Well, you have all the evidence there is, all the evidence anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.
>
> Now, I am not going to accept this. *You have got to reach a decision in this case.* * * *
>
> Of course, every case involves a problem and *you have got to weigh the evidence and reach a conclusion.* That is what jurors are for. * * *
>
> *It is a simple case.* We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.
>
> I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock to-

> morrow morning and then resume your deliberations *because this case has to be decided.* That is all the evidence there is, that is all the evidence anybody can have. *If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible would it.* * * * (R. 48, 49).[9] (Emphasis added.)

The rationale of the *Allen* case is that jurors of the minority view should give consideration to the majority view. However, in *Allen,* this Court carefully added the proviso:

> if they (the minority jurors) can conscientiously do so.

In this case, the trial judge completely left out the ameliorating statement to the effect that minority jurors should consider the majority view *if they can conscientiously do so.* This is contrary to *Allen* and for this reason alone the decision below should be reversed. In *Rogers* v. *United States,* 289 F. 2d 433 (C.A. 4, 1961), a conviction was reversed because the trial judge, in giving the Allen charge, failed to inform the jurors that they had the right to hold on to their conscientious convictions. In that case, the Court said that the Allen charge is dependent upon the

---

[9] In considering the above remarks, the United States Court of Appeals for the District of Columbia held that they did not require reversal. That Court went on to state, in a footnote, that the above statements did not purport to be a charge under *Allen* v. *United States, supra,* but only a judge's response to a jury which reported it was "deadlocked" after a brief deliberation. But, the Court of Appeals was obviously in error when it said the charge was not made under the authority of *Allen* v. *United States,* as there is no other authority for such a charge. From this, it is crystal clear that the decision rendered by the United States Court of Appeals for the District of Columbia in this case was based on an interpretation of the *Allen* case, and must be considered in the light of the *Allen* case.

moderating reminder to the individual jurors of their own responsibility to retain their views if they could not in good faith go along with the majority. The Court reversed solely because of the one-sidedness of the charge.

But, the trial judge in this case went much further than what has already been stated. Here, he ridiculed the jury by stating that they wouldn't be necessary unless there was a problem. The obvious inference is that men of good intelligence could solve such a problem. This was emphasized by the trial judge's later statement that it is a simple case. He even embellished on this by saying, "We have had cases that are much harder than this one that juries decide. As I say, if cases were open and shut, we wouldn't need any juries." As if his point wasn't made, he then further stated to the jury, "If I excuse you we will have to try the case again with some other jury and they will have the same evidence. Now, that would not be very sensible would it." In *Powell* v. *United States, supra*, the trial court was reversed for using the following language in its Allen charge:

> Some jury will have to pass upon this case and you twelve men are just as competent as any other jury.
>
> No credit to a juror to stand out in a spirit of pure stubbornness.
>
> You ought to be able to reach a verdict in this case.

In finding no authority for the trial court to go beyond the wording of *Allen*, the Court of Appeals for the Fifth Circuit held that no juror should be induced to agree to a verdict by a fear that a failure to do so will reflect upon his intelligence or integrity.

Practically every word in every paragraph of the supplemental charge given here has been rightly condemned as shown above. Yet, the court below wrote it off as harmless—a mere response by the trial judge to a jury that reported that it was deadlocked.

But, this fact was not completely overlooked. Judge Wright, in the dissenting opinion filed below, said:

> The charge to the jury given here is more coercive than anything I have heard or read in 25 years of exposure to criminal jury trials. Even the 67-year-old *Allen* charge, now condemned as "the dynamite charge," does not go so far in coercing the jury.

When the charge given in the instant case is compared with *Powell* and *Rogers*, and to the *Allen* case itself, there can be no question that it is far excessive. Clearly, the court below was in error and this case should be reversed on the grounds of the coerciveness of the supplemental charge that was given.

Conclusion

For the foregoing reasons, petitioner urges that the judgment below should be reversed and the case remanded with directions to a judgment of acquittal.

Respectfully submitted,

M. Michael Cramer
H. Thomas Sisk
Counsel for Petitioner
McLachlen Bank Building
Washington, D.C.

Of Counsel:

David B. Isbell
National Capital Area
Civil Liberties Union
1101 Vermont Avenue, N.W.
Washington, D.C.

But, this fact was not completely overlooked. Judge Wright, in the dissenting opinion filed below, said:

> The charge to the jury given here is more coercive than anything I have heard or read in 25 years of exposure to criminal jury trials. Even the 67-year-old *Allen* charge, now condemned as "the dynamite charge," does not go so far in coercing the jury.

When the charge given in the instant case is compared with *Powell* and *Rogers*, and to the *Allen* case itself, there can be no question that it is far excessive. Clearly, the court below was in error and this case should be reversed on the grounds of the coerciveness of the supplemental charge that was given.

Conclusion

For the foregoing reasons, petitioner urges that the judgment below should be reversed and the case remanded with directions to a judgment of acquittal.

Respectfully submitted.

M. Michael Cramer
H. Thomas Sisk
Counsel for Petitioner
McLachlen Bank Building
Washington, D.C.

Of Counsel:

David B. Isbell
National Capital Area
Civil Liberties Union
1101 Vermont Avenue, N.W.
Washington, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
The evidence on count 1	3
The evidence on count 2	5
The challenged supplemental instruction	8
Counsel's requested additional instruction	10
The jury's final deliberations and verdict	11
Summary of Argument	11
Argument	14
I. The instruction that the jury "have got" to reach a decision was not coercive in its context and, not having been objected to, does not warrant reversal	14
A. The instruction was not coercive in its context, and did not in fact result in a compelled verdict	15
B. Reversal would be particularly unwarranted in view of petitioner's failure to object to the instruction	21
II. There is no occasion for the Court in this case to reexamine the validity of the *Allen* charge	27
Conclusion	32
Appendix	33

CITATIONS

Cases:

Abbott v. *Commonwealth*, 352 S.W. 2d 552 33

Allen v. *United States*, 164 U.S. 492 ..... 2, 13, 14, 27, 28, 29, 20, 31, 33, 34, 35, 36

Allis v. *United States*, 155 U.S. 117 ..... 23, 27

Anderson v. *United States*, 262 F. 2d 764, certiorari denied, 360 U.S. 929 30

Andrews v. *United States*, 309 F. 2d 127, certiorari denied, 372 U.S. 946 ..... 23, 30

Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U.S. 800 31

Cases—Continued

	Page
Bord v. *United States*, 133 F. 2d 313, certiorari denied, 317 U.S. 671	31
Bowen v. *United States*, 153 F. 2d 747, certiorari denied, 328 U.S. 835	30
Boyd v. *State*, 217 Wis. 149	34, 37
Brasfield v. *United States*, 272 U.S. 448	14, 17
Bufkins v. *State*, 20 Ala. App. 457, certiorari denied, 212 Ala. 638	33
Burton v. *United States*, 196 U.S. 283	14, 17
Campbell v. *United States*, 316 F. 2d 681	30
Chase v. *State*, 369 P. 2d 997	33
Christy v. *United States*, 261 F. 2d 357, certiorari denied, 360 U.S. 919	30
Commonwealth v. *Campbell*, 116 Pa. Super. 180	34
Commonwealth v. *Hassan*, 235 Mass. 26	34
Commonwealth v. *Tuey*, 8 Cush. (Mass.) 1	28, 33, 34
Costello v. *United States*, 255 F. 2d 389, certiorari denied, 358 U.S. 830	30
Counts v. *Commonwealth*, 137 Va. 744	34, 35
Coupe v. *United States*, 113 F. 2d 145, certiorari denied, 310 U.S. 651	31
Culp v. *United States*, 131 F. 2d 93	31
Eikmeier v. *Bennett*, 143 Kans. 888	34, 35
Estes v. *United States*, 335 F. 2d 609, certiorari denied January 18, 1965, No. 601, this Term	18, 19, 30
Green v. *United States*, 309 F. 2d 852	30
Hagans v. *United States*, 261 F. 2d 924, certiorari denied, 359 U.S. 967	30
Henry v. *Mississippi*, No. 6, this Term, decided January 18, 1965	23
Hewitt v. *United States*, 110 F. 2d 1, certiorari denied, 310 U.S. 641	31
Highland Foundry Co. v. *New York, New Haven, and Hartford Railroad Co.*, 199 Mass. 403	34
Huffman v. *United States*, 297 F. 2d 754, certiorari denied, 370 U.S. 955	23, 30
Hutson v. *United States*, 238 F. 2d 167, certiorari denied, 348 U.S. 819	30
Kawakita v. *United States*, 343 U.S. 717, affirming 190 F. 2d 506	29, 30, 31
Kleven v. *United States*, 240 F. 2d 270	30

Cases—Continued

	Page
Leech v. *People*, 112 Colo. 120	36
Lias v. *United States*, 284 U.S. 584, affirming 51 F. 2d 215	29
McGaha v. *State*, 216 Ark. 165	33
Mills v. *People*, 146 Colo 457, certiorari denied, 369 U.S. 841	33, 36
Montgomery v. *State*, 19 Okla. Cr. 224	34
Nicholson v. *State*, 24 Wyo. 347	34
People v. *Baumgartner*, 166 Cal. App. 2d 103	33
People v. *Chivas*, 322 Mich. 384	34
People v. *Faber*, 199 N.Y. 256	34
Powell v. *United States*, 297 F. 2d 318	23
Rippetoe v. *State*, 67 Tex. Cr. 192	34
Secor v. *State*, 188 Wis. 621	37
Sevilla v. *The People*, 65 Colo. 437	33
Simmons v. *State*, 198 Tenn. 587	34
Speak v. *United States*, 161 F. 2d 562	30
State v. *Bogardus*, 188 Iowa 1293	33
State v. *Bozarth*, 361 S.W. 2d 819	34
State v. *Butler*, 96 Ore. 219	34
State v. *Doan*, 225 Minn. 193	34
State v. *Dudoussat*, 47 La. Ann. 977	33
State v. *Egland*, 23 S.D. 323	34
State v. *Evans*, 88 Ariz. 364, certiorari denied, 371 U.S. 835	35
State v. *Gorham*, 67 Vt. 365	34
State v. *Horton*, 57 N.M. 257	34, 36
State v. *Moon*, 20 Idaho 202	36
State v. *Neff*, 169 Kans. 116, certiorari denied, 340 U.S. 866	36
State v. *Maclary*, 193 A. 2d 195	33
State v. *Nelson*, 63 N.M. 428	36
State v. *Pike*, 65 Me. 111	33
State v. *Pugh*, 183 N.C. 800	34
State v. *Pulley*, 216 S.C. 552	34
State v. *Pyle*, 143 Kans. 772	26, 35
State v. *Randall*, 137 Mont. 534	34
State v. *Scott*, 123 Atl. 292	34
State v. *Thomas*, 86 Ariz. 161	34, 35
State v. *Thomas*, 63 Wash. 2d 59	34
State v. *Tope*, 86 Idaho 462	33
State v. *Voeckell*, 69 Ariz. 145	35

Cases—Continued

	Page
State v. *Walters*, 145 Conn. 60, appeal dismissed, 358 U.S. 46	33
State v. *Whitaker*, 275 S.W. 2d 316	25
State v. *Williams*, 39 N.J. 471, certiorari denied, 374 U.S. 855	18, 34
Territory v. *Donahue*, 16 N.M. 17	34, 36
United States v. *Allis*, 73 Fed. 165	27
United States v. *Furlong*, 194 F. 2d 1, certiorari denied, 343 U.S. 950	23, 30
United States v. *Gordon*, 196 F. 2d 886, reversed, 344 U.S. 414	30
United States v. *Kahaner*, 317 F. 2d 459, certiorari denied, 375 U.S. 836	18, 30
United States v. *Rogers*, 289 F. 2d 433	14, 30
United States v. *Samuel Dunkel & Co.*, 173 F. 2d 506	30
United States v. *Tomoya Kawakita*, 96 F. Supp. 824, affirmed, 190 F. 2d 506, affirmed, 343 U.S. 717	31
United States v. *Tateo*, 377 U.S. 463	14
Weathers v. *United States*, 126 F. 2d 118, certiorari denied, 316 U.S. 681	31
Wegman v. *United States*, 272 F. 2d 31	30
Wolin v. *United States*, 211 F. 2d 770, certiorari denied, 348 U.S. 819	30
Wright v. *United States*, 175 F. 2d 384, certiorari denied, 338 U.S. 873	30
Yancy v. *State*, 173 Ga. 685	33

Statutes and rules:

District of Columbia Code:	
§ 22–501	2
§ 22–2901	2
Federal Rules of Criminal Procedure:	
Rule 30	12, 21, 22
Rule 52(b)	22

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 761

MELVIN C. JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 53–54) and dissenting (R. 54–59) opinions in the court of appeals are reported at 330 F. 2d 220. The *per curiam* order of the court of appeals denying a petition for rehearing *en banc*, four judges dissenting (R. 61), is not reported.

JURISDICTION

The judgment of the court of appeals (R. 60) was entered on February 13, 1964. A petition for rehearing *en banc* was denied on April 3, 1964 (R. 61). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to June 3, 1964 (R. 62), and the petition was filed on that date.

The order granting the writ was entered on December 14, 1964 (R. 63; 379 U.S. 944). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Shortly after beginning its deliberations, the jury sent a note to the trial judge advising him that it could not arrive at a verdict as to either count of a two-count indictment. In the course of his response, the trial judge stated that the jury had to reach a decision in the case. No objection was made to this statement. The questions presented are:

1. Whether, in its context and under all the circumstances, the statement was coercive, so as to require reversal of the jury's verdict of guilty on one of the counts; and

2. Whether there is any occasion for the Court to reexamine in this case the validity of the so-called *Allen* charge (approved in *Allen* v. *United States*, 164 U.S. 492), it appearing (a) that the trial judge did not purport to give that charge and (b) that the *Allen* charge differs materially from the statement of the trial judge now under review.

STATEMENT

Petitioner was charged in a two-count indictment, returned February 25, 1963, in the United States District Court for the District of Columbia, with robbing a High's Dairy Products store on December 27, 1962 (count 1), and with assault with intent to rob upon the proprietress of a grocery store on January 24, 1963 (count 2), in violation of §§ 22–2901 and 22–501,

respectively, of the District of Columbia Code (R. 42, 54). Following a trial by jury, he was found guilty on count 1 and not guilty on count 2 (R. 52). He was sentenced to imprisonment for from three to ten years (R. 54). The court of appeals affirmed the conviction, one judge dissenting (R. 60). A petition for rehearing *en banc* was denied, four judges dissenting (R. 61).

The relevant facts are as follows:

THE EVIDENCE ON COUNT 1

At approximately 6:45 p.m. on December 27, 1962, Ruth Hodges, the manager of a High's Dairy Products store in Northeast Washington, was held up by a man armed with a pistol and robbed of the contents of the store's cash register (R. 16–22). Both Miss Hodges and Mrs. Ruth McLeish, a sales clerk who was present and witnessed the incident, identified petitioner as the gunman (R. 17, 23).

Mrs. McLeish testified that the holdup occurred moments following her return to the store from a visit to another store in the neighborhood on a personal errand. As she was about to reenter her place of employment, she observed a man—whom she identified as petitioner—standing in front of the store looking up and down the street. Thinking he was a customer, she was about to speak to him as she approached, but as she got closer she saw that he was not a customer, so she continued on into the store without speaking. She was close enough to touch him as she passed (R. 17–18).

A few minutes later (Mrs. McLeish further testified), the man whom she had seen outside the store entered, pointed a gun at Miss Hodges, and demanded the contents of the cash drawer. Miss Hodges opened the register and asked the gunman whether he "want[ed] the change." He said, "No, lady, just the bills." Miss Hodges put the money in a paper bag and delivered it to her assailant, who then fled. During the incident, which lasted between three and five minutes, Mrs. McLeish had the opportunity to observe the robber's unmasked face at close range. She testified that, throughout the proceedings, she "didn't say anything, didn't do anything. I just looked at him"—from a distance of a few feet (R. 18–20).

Aside from unproductive cross-examination, the defense made no attempt to shake or impeach Mrs. McLeish's identification of petitioner as the holdup man.

Miss Hodges also identified petitioner as the gunman (R. 23). Her testimony, however, was somewhat weakened by cross-examination attempting to establish that she had earlier told an investigator for the Legal Aid Agency (Mr. Savage) that she could not identify the holdup man. After some wavering as to her memory of the event and the content of the conversation with Mr. Savage, Miss Hodges denied that she had told Savage that she could not identify the defendant as the holdup man (R. 24–31). Mr. Savage then testified that Miss Hodges had told him by telephone that she "was not able to identify the man" (R. 32–33).

Petitioner, testifying in his own behalf, denied committing the robbery (R. 36–37). He acknowledged that he knew the location of the store, that he had been in it on other occasions, and that he had been out of work for some time at the time of the holdup (R. 35–37). He could not remember where he had been on the night of the robbery (R. 36).

THE EVIDENCE ON COUNT 2

On January 24, 1963, at about 12:40 p.m., Sophie Korn, the proprietress of Phil's Market, a grocery store located at 301 12th Street, S.E., Washington, D.C., was held up by a lone gunman and directed to turn over the money in the cash register. While Mrs. Korn was putting the money in a bag preparatory to delivering it to her assailant, the gunman, surprised by the sudden entrance of Sophie's husband, Phillip Korn, fled from the premises empty-handed (R. 2–4, 7–8). Both Mrs. Korn and Joseph Davis, Jr., a sales clerk who witnessed the incident, identified petitioner at the trial as the would-be robber (R. 5, 8).

Immediately following the bandit's departure, Mrs. Korn called the police and reported the holdup (R. 4). About five or ten minutes later,[1] petitioner, who had been arrested in the interval a few blocks away (under circumstances related *infra*) was brought to the store in police custody. He was identified at

[1] The elapsed interval was five minutes or less according to Davis (R. 8–9), about ten minutes according to Mrs. Korn (R. 4).

the scene by Mrs. Korn and Davis as the man who had just held them up (R. 4–5, 8, 9, 11–13).

Although Mrs. Korn and Davis positively identified petitioner (both at the trial and at the scene) as the would-be robber, each testified that the holdup man was wearing a different type of coat from that which petitioner was wearing when he was brought to the store in the custody of the police (R. 6, 8, 9). Mrs. Korn described the garment worn by the gunman as "a three-quarter coat," whereas the coat which petitioner had on when he was brought to the store was, in her words, a "short, hip length" coat. She was "positive" that the coats were different (R. 6). Davis also testified that the coat worn by the bandit "reached down to his knees," whereas petitioner, when brought to the store, was wearing a "shorter coat," or "jacket" (R. 8, 9).

Phillip Korn (who was called as a defense witness) gave similar testimony. He testified that the man whom the police brought to the store (petitioner) "wore a different coat" from that worn by the holdup man (R. 27). Korn further testified that when the arresting officer, Jerome Demoro, asked him at the store (immediately following petitioner's arrest) whether he could identify petitioner as the culprit, he stated that he could not, and remarked to the officer that the holdup man "wore a long overcoat" (R. 28).

Officer Demoro testified that, when arrested, petitioner was in fact wearing "a suede leather jacket with a zipper front" and that "it was a waist-length jacket" (R. 14).

The circumstances of petitioner's arrest, as related by Officer Demoro, were as follows: At approximately 12:40 p.m. on the day of the holdup, Demoro and a fellow officer, in plain clothes and traveling in an unmarked vehicle, were cruising in the vicinity of the 19th and C Streets, N.E., when they received a radio report of the attempted robbery. They proceeded immediately to the intersection of East Capitol and 12th Streets, N.E., on the northeast side of Lincoln Park, where they parked their vehicle. Within a few minutes they observed petitioner walking "north towards 12th Street," approximately 20 feet inside the park. Petitioner "showed signs of breathing heavy," and there was "vapor coming from his mouth, as though he had been running." He "seemed very nervous" and "kept looking back." Crossing East Capitol Street, directly in front of the officers' car, he continued north on 12th Street to an alley connecting 11th and 12th Streets, roughly 300 feet north of East Capitol. Commencing to run at this time, petitioner turned into the alley for a distance of approximately 20 feet. At this point he reversed his direction and backtracked three or four steps towards 12th Street. Then, again reversing his direction, he continued running towards 11th Street. The officers, who had in the meantime begun to give chase in their automobile, arrested petitioner just as he reached 11th Street (R. 11–15). As the officers jumped from their vehicle, they shouted "police" at petitioner, who stopped, turned towards the officers, and "threw both arms straight out." An on-the-spot search was made of petitioner's person for a weapon or weapons, but none

was discovered (R. 13, 15). The officers then took petitioner to the scene of the holdup (R. 13).

Petitioner testified that he did not commit the crime in issue and denied having a gun in his possession at any time on the day of the offense (R. 34–35). He testified that at the time of his arrest he was on his way from his home, located at 1240 11th Street, S.E., to the home of a girl friend, on 10th Street (apparently N.E.) (R. 34, 40). He denied that he started to run as he was in the alley between 11th and 12th Streets, as related by Officer Demoro (R. 39). He admitted reversing and then re-reversing his direction in the alley, as attested by the officer, explaining that this action was due to indecision on his part whether to continue on to his girl friend's house (his original destination) or to go to the home of a cousin, on 15th Street (apparently N.E.) (R. 40–41).

THE CHALLENGED SUPPLEMENTAL INSTRUCTION

After the trial court gave its principal instructions (R. 42–48), the jury retired to deliberate at 2:22 p.m. on May 27, 1963 (R. 48). Slightly more than two hours later, at 4:30 p.m., the jury sent a note to the court advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence" (R. 48). The court thereupon recalled the jury to the courtroom and the following took place (R. 48–49):

> The Court: Mr. Foreman, the Court has received your note reading as follows:
>
> "The jury cannot come to a decision on both counts because of insufficient evidence."

Well, you have all the evidence there is, all the evidence that anybody can have. That is what we have jurors for, to decide on the evidence. If there weren't any problems we wouldn't have a jury.

Now, I am not going to accept this. You have got to reach a decision in this case.

You may resume your seat, Mr. Foreman.

Of course, every case involves a problem and you have got to weigh the evidence and reach a conclusion. That is what you are jurors for.

Now, I am going to let you go home at this time. Each of you think it over overnight and I am going to ask you to be back here by 10 o'clock tomorrow morning and resume your deliberations. Now, from the moment you leave the jury box until you return tomorrow morning at 10 o'clock to resume your deliberations, please don't discuss this case with anyone, not even amongst yourselves, not even at home with members of your families. Each of you can individually think about it, but don't discuss it and don't let anybody talk to you about it. Perhaps after you have had a good rest overnight you will be in a position to reach a verdict.

It is a simple case. We have cases that are much harder than this one that juries decide. As I say, if cases were open and shut we wouldn't need any juries.

I am going to excuse you at this time and please be back in the jury room a few minutes before 10 o'clock tomorrow morning and then resume your deliberations because this case has to be decided. That is all the evidence there is, that is all the evidence anybody can have.

> If I excuse you we have to try the case again with some other jury and they will have the same evidence. Now that would not be very sensible, would it. So, you will be excused at this time, ladies and gentlemen of the jury. I know that you will reach a decision tomorrow after you think about it overnight.

The jury was thereupon, at 4:35 p.m., dismissed for the day (R. 49). The defense made no objection, then or later, to the foregoing remarks.

COUNSEL'S REQUESTED ADDITIONAL INSTRUCTION

At 10 o'clock on the following morning, May 28, counsel for petitioner, referring to the jury's note of the previous afternoon, advised the court that he had prepared a "proposed instruction in response to" the note, which he asked the court to give (R. 50). The proposed instruction, which is not contained among the papers certified to this Court, but may be found among the original papers on file in the district court (Cr. No. 208–63), was as follows:

> You are instructed that if you find there to be insufficient evidence to find the defendant guilty beyond a reasonable doubt as to either or both counts in the indictment, then your verdict must be not guilty as to either or both counts.

The court, stating that it did not propose to give the jury any additional instructions at that time, denied counsel's request (R. 50).

THE JURY'S FINAL DELIBERATIONS AND VERDICT

The jury thereupon resumed its deliberations. About an hour later, at 11 a.m., it sent another note to the court, in which it "request[ed] the testimony of Ruth Hodges" (R. 50–51). At the court's direction, the court reporter read to the jury the entire testimony of that witness (see *supra*, p. 4) (R. 51). The jury then once again retired to deliberate, and at 2:20 p.m., approximately three hours later,[2] returned its verdict (R. 52).

SUMMARY OF ARGUMENT

I

A. The instruction that the jury "have got" to reach a decision was not coercive in its context, and did not in fact result in a compelled verdict.

1. The jury knew that the instruction was not meant to be taken literally, since the judge referred explicitly to the possibility that he might finally be required to discharge them without a verdict. The judge did not intimate what he thought the verdict should be, made no attempt to determine how the jurors were divided, and did not suggest that those in the minority should pay special heed to the majority's views. He did not suggest that any juror was being obstinate, or that any should surrender

[2] The record does not reflect precisely how much of this three-hour period (during part of which the jury presumably was at lunch) was spent in actual deliberation.

a conscientious conviction, nor did he compel the jurors to continue their deliberations into the evening hours.

2. That the verdict was the product of reasoned argument, not coercion, is further indicated by the fact that the jury deliberated some three or four hours after reconvening before reaching its verdict. It is especially significant that in the course of the resumed deliberations the jury asked to have read to it, for more careful analysis, the testimony of the government witness whose identification of petitioner as the count-1 gunman the defense had sought to impeach.

3. There is no sound basis for Judge Wright's dissenting suggestion that the verdict, guilty on count 1 and not guilty on count 2, was in all probability a compromise—the coerced finding of jurors who believed themselves bound to bring in some verdict even though they could not agree. Although petitioner was identified by eyewitnesses as the perpetrator of both of the crimes charged, the greater basis for a reasonable doubt as to his guilt on count 2 can be clearly seen, even from the cold record.

B. Reversal would be particularly unwarranted in view of petitioner's failure to object to the instruction at the trial. If petitioner had seasonably objected, the judge would have had an opportunity to amend the instruction to meet counsel's criticism. Thus the rationale of Rule 30 of the Federal Rules of Criminal Procedure, requiring that objection be made as a condition of the right to assign any portion of

the charge as error, weighs heavily against petitioner in his present untimely challenge.

Nor should the rule of "plain error" be applicable here. When the jury reported that it could not agree, defense counsel may well have regarded the development as highly encouraging—an indication that a favorable outcome was at least more likely than a verdict of guilt. A "hung" jury, on the other hand, would have meant a second trial, which might easily go worse for the defense than the first. One can hardly conclude, in these circumstances, that counsel's failure to object was due to lack of alertness. The more likely explanation, we suggest, was that counsel, anticipating a favorable verdict on both counts, did not wish to jeopardize this outcome by requesting amended instructions calculated to increase the likelihood of a "hung" jury. An accused who has thus taken his chances on a favorable verdict should not be permitted, when the decision proves not wholly to his liking, to demand a new trial (as to the part of the verdict which is adverse) on the basis of an error in the instructions which would have been readily correctible had it been complained of at the time.

II

There is no occasion for the Court in this case to reexamine the validity of the so-called *Allen* charge (*Allen* v. *United States*, 164 U.S. 492, 501–502). For the statements of the trial court here in issue did not in any way purport to be the *Allen* charge, and comparison shows that the remarks have little in common

766-026—65——3

with that classic instruction. At all events, the *Allen* instruction, in the carefully phrased form in which it received this Court's unanimous approval and has since been twice reaffirmed (most recently in 1952), is a suitable method, when used in proper circumstances and in the sound discretion of the trial court, for reminding jurors of their duty to decide the case before them if it is possible to do so consistently with their conscientious convictions.

ARGUMENT

I

THE INSTRUCTION THAT THE JURY "HAVE GOT" TO REACH A DECISION WAS NOT COERCIVE. IN ITS CONTEXT AND NOT HAVING BEEN OBJECTED TO, DOES NOT WARRANT REVERSAL

Petitioner, stressing that the trial judge told the jury that they "have got to reach a decision in this case," urges that the resulting verdict was coerced (Pet. Br. 17–20). Of course, if this Court should conclude that the judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial;[3] the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration. See *Brasfield* v. *United States*, 272 U.S. 448, 450; *Burton* v. *United States*, 196 U.S. 283, 307–308; *United States* v. *Rogers*, 289 F. 2d 433, 435 (C.A. 4):

[3] Petitioner's unexplained suggestion that a "judgment of acquittal" should be entered (Pet. Br. 20) is plainly unsound. Cf. *United States* v. *Fateo*, 377 U.S. 463.

We do not agree, however, that the judge's remarks were coercive, when viewed in their context, nor that the verdict was in fact the product of improper compulsion. It is undisputed, moreover, that the statements were not objected to at the trial—a circumstance which would normally preclude reliance upon them as a basis for reversal. Counsel's failure to object would, of course, pose no obstacle, under the "plain error" principle, to the Court's taking notice of the error, if the coercive character of the statements were indeed that plain; but in attempting to recreate an atmosphere which the reviewing court cannot experience, the failure of counsel to object is properly to be weighed as evidence that he saw nothing coercive in what occurred.[4] At worst, any irregularity was one which could have been promptly corrected had exception been taken.

A. THE INSTRUCTION WAS NOT COERCIVE IN ITS CONTEXT, AND DID NOT IN FACT RESULT IN A COMPELLED VERDICT

The jury's note apprising the judge that it had been unable to arrive at a verdict was sent after it had been deliberating for only slightly longer than two hours (*supra*, p. 8). The judge, in these circumstances, plainly had every reason to believe that the jury had not yet made a sufficiently diligent effort to reach a verdict. He pointed out to them

[4] The court below noted counsel's failure to object, and thought it "significant" that the remarks were being objected to for the first time on appeal. It nevertheless considered the matter, and concluded that, viewed in the context of the whole charge, the challenged statements did not require reversal (R. 53–54).

that they already had all the evidence there was, and that it was their function to decide the case on that evidence. Following the remark now complained of, that the jurors had to reach a decision in the case, he pointed out that "every case involves a problem" and that it is the task of jurors to "weigh the evidence and reach a conclusion." Noting that if he finally discharged them at that time it would be necessary to re-try the case before another jury, which would have "the same evidence"—a course which, the judge said, "would not be very sensible"—he told them that he was going to dismiss them for the day (it was then 4:30 p.m.), that each of them should "think it over overnight," and that they should resume their deliberations the following morning. Following a "good rest overnight," he suggested, they might find themselves capable of arriving at a verdict (*supra,* pp. 8–10).

The jury were accordingly dismissed for the day and resumed their deliberations the following morning at 10 o'clock. At 11 o'clock they called for the testimony of Ruth Hodges, the High's store manager, whose identification of petitioner as the count-1 gunman, though fully corroborated by the testimony of the sales clerk, Mrs. McLeish, had been the subject of impeachment efforts by the defense. Following the reading of Miss Hodges' testimony, the jury again retired to deliberate, and returned their verdict three hours later, at 2:20 p.m. (*supra,* pp. 10–11).

1. Ignoring for the moment the events of the day following the challenged instructions, and looking only at the comments themselves and the immediate cir-

cumstances, we submit that the statements were not coercive in their overall impact.

That the jury could not literally have understood that they were bound to return a verdict at all events, regardless of whether they could reconcile their views, is apparent from the fact that the judge referred explicitly to the possibility that he might finally be required to discharge them without a verdict. In that event, as he explained it would be necessary to re-try the case before another jury. The jurors were thus fully aware that the statement that they "have got" to reach a decision was not to be taken literally, and that all the judge really meant was that they should make a renewed and determined effort to achieve agreement after the refreshment of a night's sleep.

We point out also that the judge in no way intimated what he thought the jury's verdict should be, and made no attempt to determine how the jurors were divided. Cf. *Brasfield* v. *United States,* 272 U.S. 448; *Burton* v. *United States,* 196 U.S. 283, 307–308. Neither was there any suggestion that the jurors in the minority should acquiesce in, or pay special heed to, the views of the majority, or that any juror was being obstinate, or that any should modify his convictions or surrender a conscientiously held view. This was not a case, moreover, in which the judge summoned the jury from their deliberations and demanded to know the cause of their delay in reaching agreement—a procedure which the jury might reasonably have construed as evidencing judicial impa-

tience with their slowness. Here the initiative in reporting the impasse came entirely from the jurors themselves.

Most important, the judge did not compel the jurors to continue their deliberations into the evening hours, or beyond the normal time for recessing for the day. He permitted them to adjourn at a plainly reasonable hour and to reconvene the following morning, when they would be refreshed and relaxed. Thus the present case presents none of the aspects of a case in which deadlocked jurors have been required to sit far into the night, under conditions suggesting that the verdict was more probably the fruit of physical exhaustion than a true concurrence of views freely reached.

2. That the jury was fully aware that it was not required to join in a verdict in the absence of actual agreement is further evidenced by its action on the following day. One would expect a "coerced" jury to return with its compelled verdict relatively promptly. Cf. *Estes* v. *United States,* 335 F.2d 609, 618–619 (C.A. 5), certiorari denied January 18, 1965, No. 601, this Term; *United States* v. *Kahaner,* 317 F. 2d 459, 483–484 (C.A. 2), certiorari denied, 375 U.S. 836; *State* v. *Williams,* 39 N.J. 471, 485 (1963), certiorari denied, 374 U.S. 855. The verdict here was returned at 2:20 p.m. on May 28, more than four hours after the jury's resumption of its deliberations the following morning, and roughly three hours after the reading of Miss Hodges' testimony (*supra,* pp. 10–11). "If the charge can be denominated a 'dynamite'

charge," as the court observed under similar circumstances in the *Estes* case, *supra*, "it appears to have been a dud * * *" (335 F. 2d at 618–619).

The fact that the jury, during its renewed deliberations, requested the reading of the particular testimony it called for is also a convincing indication that the verdict was not compelled. It was Miss Hodges whose identification of petitioner as the gunman in the count-1 robbery the defense had tried to impeach (*supra*, p. 4). The jury's request to have this witness' testimony repeated strongly suggests that its verdict was the product of reasoned argument, not coercion. At all events, there is clearly nothing in the sequence of events following the judge's supplemental instructions which tends in any way to show that the will of any juror was overborne or that any felt constrained to surrender conscientious convictions.

3. Finally, we submit that there is no basis for Judge Wright's dissenting suggestion (R. 56) that the split verdict in this case, guilty on one count and not guilty on the other, was "in all probability" "a compromise"—the coerced finding of jurors who, being unable to agree, believed themselves bound nevertheless to bring in some verdict. There would undoubtedly be some force to the judge's conjecture if the evidence on each of the two counts were roughly equivalent in its probative force—so that no rational reason could be seen for the difference in the jury's findings. This verdict, on the contrary, is plainly a reasonable one, and contains no hint that it was the

fruit of compromise, enforced or otherwise. Although petitioner was identified by eyewitnesses as the perpetrator of both of the crimes charged in the indictment, the basis for the reasonable doubt presumably generated in the minds of the jurors in respect of count 2 can be clearly seen, even from the cold record.

Unlike count 1—as to which there was no circumstantial evidence whatever to cast doubt on the eyewitness identification of petitioner as the High's store robber (*supra,* pp. 3–4)[5]—the evidence on count 2 left troubling doubts as to the accuracy of the testimony identifying petitioner as the gunman who held up the other store, Phil's Market. All three of the eyewitnesses to the latter holdup, including the two—Mrs. Korn and Joseph Davis, Jr.—who identified petitioner as the gunman, were in agreement that petitioner, when he was brought to the scene in police custody within minutes of the holdup, seemed to have on a different coat from that worn by the would-be robber. Whereas it was definitely established (by the arresting officer's testimony) that petitioner was wearing a waist-length jacket when he was arrested and brought to the scene of the holdup, each of these witnesses testified that the holdup man seemed to be wearing a longer

[5] Even if, in light of the impeachment testimony (*supra,* p. 4), the jury were not wholly satisfied as to the reliability of Miss Hodges' identification testimony, they still had before them the solid testimony of Mrs. McLeish, whose identification of petitioner as the count-1 gunman was in nowise placed in question (*supra,* pp. 3–4). Mrs. McLeish, the evidence showed, had had a particularly good opportunity to observe and remember the face and features of the holdup man.

outer garment—either a "three-quarter coat" or an ordinary overcoat—and one of the three was "positive" that the coats were different (*supra*, pp. 5–6). In view of the shortness of the interval between the holdup and the arrest—ten minutes at the most—this testimony was clearly sufficient to create a reasonable doubt in the jurors' minds as to the accuracy and reliability of the critical identification. A further factor, acknowledged by the prosecution, was that petitioner had no weapon on his person when he was arrested (*supra*, pp. 7–8). While it would have been a simple enough matter for petitioner (assuming he was the gunman) to have discarded the holdup gun somewhere between the market and the point at which he was first observed by the officers (a few blocks away), the jury might reasonably have thought it significant that no evidence was introduced as to the finding of such a weapon along the route between the two points.

B. REVERSAL WOULD BE PARTICULARLY UNWARRANTED IN VIEW OF PETITIONER'S FAILURE TO OBJECT TO THE INSTRUCTION

As previously noted, no objection was made at the trial to the supplemental remarks of the judge, which the petitioner now says were fatally coercive. Ordinarily, under Rule 30 of the Federal Rules of Criminal Procedure,[6] petitioner would therefore have

[6] Rule 30 provides, in relevant part, that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

been precluded from assigning the statements as error. The court of appeals, while noting petitioner's failure to object, nevertheless "considered the matter" and concluded that, viewed in the context of the whole charge, the challenged statements did not require reversal (R. 53–54). Since the court of appeals thus reached and decided the merits, we do not dispute the proposition that it would be appropriate—Rule 30 notwithstanding—for this Court to reach the merits also. What we do urge is that petitioner's failure to object at the trial is an important factor to be considered in deciding the merits. Obviously an accused who permits an incident at his trial to pass without comment or criticism is in a poor position, after entry of judgment, to base upon it a claim of reversible error. Only if he can meet the stringent test of Rule 52(b)—authorizing notice to be taken (notwithstanding failure to object) of "[p]lain errors * * * affecting substantial rights"—should his tardy challenge be allowed to succeed, and the jury's verdict annulled. For reasons we shall elaborate, this case would, in our view, be an inappropriate one for the application of the "plain error" rationale.

1. Rule 30's insistence that a defendant must object to an error in the instructions at once, before the jury retires to consider its verdict, is obviously no mere "technical" requirement:

> It is a salutary rule, for its purpose is to give the judge an opportunity to make any correction which he thinks is proper and, thus, to minimize the possibility of error. * * * It is

> intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

United States v. *Furlong*, 194 F. 2d 1, 3 (C.A. 7), certiorari denied, 343 U.S. 950.[7] If petitioner had objected to the judge's remarks on the ground that they failed to make plain to the jurors the duty of each to adhere at all events to his conscientious convictions, the judge might well have, and in our view almost certainly would have, amended his statement to meet this criticism. The clear rationale of Rule 30 is thus plainly apposite and weighs heavily against petitioner in his present untimely attack on the comments as prejudicially coercive.[8] Cf. *Henry* v. *Mississippi*, No. 6, this Term, decided January 18, 1965, slip opinion, p. 5.

---

[7] The *Furlong* case involved, as here, a post-verdict attack on an allegedly coercive instruction. Compare *Allis* v. *United States*, 155 U.S. 117, 122 (involving the same issue): "A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

[8] Petitioner's reliance on such cases as *Powell* v. *United States*, 297 F. 2d 318 (C.A. 5) (Pet. Br. 9, 19), in which the challenged supplemental remarks were seasonably objected to (see 297 F. 2d at 320), is accordingly misplaced. Cf. *Huffman* v. *United States*, 297 F. 2d 754, 755 (C.A. 5), certiorari denied, 370 U.S. 955, and *Andrews* v. *United States*, 309 F. 2d 127, 129 (C.A. 5), certiorari denied, 372 U.S. 946, in each of which cases the court, in affirming a conviction based on allegedly coercive instructions, pointed specifically to the accused's failure to object—at the same time rejecting the claim on its merits.

2. Nor would this be a suitable case in which to apply the "plain error" principle. It was manifestly as much in petitioner's interest as the government's that the jury agree on a verdict. The alternative, a "hung" jury, meant a second trial, which might easily go worse from the defense's standpoint than the one then nearly concluded. For example, Miss Hodges, whose identification of petitioner as the count-1 gunman may have been substantially impaired in the minds of the jurors, could not be expected, at a second trial, to leave herself so vulnerable to impeachment (*supra*, p. 4). And the doubt which defense counsel must confidently have believed he had planted in the jurors' minds with respect to petitioner's guilt on count 2 (*supra*, pp. 5–6, 20–21) might not be so readily engendered on a retrial. When, therefore, the jury reported that it could not come to a decision on either count because of "insufficient evidence," petitioner's attorney may well have regarded the development as highly encouraging. While far from a finding of innocence, it indicated that a favorable outcome was at least more likely than a verdict of guilt. Far from taking exception to the court's subsequent remarks, petitioner's counsel sought to capitalize on the situation by requesting a supplemental instruction which would have directed the jury to acquit on both counts if it found the evidence (in the words of the jurors' note) "insufficient" (*supra*, p. 10). When the court properly declined to give the instruction—since the substance of such an instruction had already been given (R. 44)—counsel, still refraining from a request

for modification of the remarks now challenged, permitted the case to go to verdict, without objection, on the instructions as given.

In these circumstances one can hardly conclude that counsel's failure to except was due to mere negligence or lack of alertness. Counsel was well aware, as we have indicated, that there existed sound grounds for the hope that a favorable verdict would be rendered on both counts—an expectation which, indeed, was eventually realized as to one of the counts. It was clear, at least, that the jury was having difficulties with both counts, as its note attested. The more likely explanation for counsel's failure to object, we suggest, was that counsel, anticipating an eventually favorable verdict on both counts, did not wish to jeopardize this outcome by requesting amended instructions calculated to increase the likelihood of a "hung" jury and the attendant necessity for retrial.

An accused who has thus taken his chances on a favorable verdict should not be permitted, when the decision proves not wholly to his liking, to demand a new trial on the basis of an error in the instructions which would have been readily correctible had it been complained of seasonably. Indeed, if petitioner prevails, the result will be that he will be entitled to a retrial on count 1 while retaining his acquittal on count 2—even though his count-2 acquittal was as much the fruit of "coercion" as was his count-1 conviction. As was said in *State* v. *Whitaker*, 275 S.W. 2d 316, 321 (Mo. 1955) (a case involving, as here, a

supplemental instruction claimed to have been objectionably coercive):

> The remarks in this case were at most an irregularity which could have been corrected by the trial judge if the objections of defendants had been brought to the court's attention at the time. But, defendants, in effect, consented to the remarks by making no objection whatever, and took their chance with the jury. They "cannot thus gamble on a favorable verdict" by permitting the trial to go to conclusion without objection, and then contend for the first time in their motion for a new trial that the court committed reversible error.[9]

The question in this case is not whether the jury may be urged to perform its historic role of agreeing on a verdict—this Court, see *infra*, pp. 27–32, has never doubted the propriety of such a charge—but whether the particular instructions here given were fatally defective because of failure to add qualifying words making it indisputably clear that conscientious disagreement is permissible. We do not doubt that the addition of such words would have been desirable. It is our belief, however, that when the charge is viewed in the light of all the surrounding circumstances, including particularly the accused's failure to raise any

[9] Cf. *State* v. *Pyle*, 143 Kans. 772, 782 (1936) (same): "[A] painstaking perusal of the record leaves this court under the impression that defendant's counsel did not regard the instruction as unfavorable to his client at the time it was given. Be that as it may, there is an elementary rule of appellate practice which is that counsel cannot sit quietly by and permit the trial court to commit error prejudicial to his client without the interposition of a timely and appropriate objection thereto."

objection, an inference that it was significantly coercive is not warranted.

II

THERE IS NO OCCASION FOR THE COURT IN THIS CASE TO REEXAMINE THE VALIDITY OF THE *ALLEN* CHARGE

Petitioner, in addition to challenging as prejudicially coercive the particular supplemental remarks made to the jury in this case, asks the Court to reexamine its decision in *Allen* v. *United States*, 164 U.S. 492, 501–502, in which it approved the instruction which has since come to be widely known as the *Allen* charge[10] (Pet. Br. 6–16). The right of an accused under the Constitution to be tried by a fair and impartial jury, it is said, carries with it the right "to have [the] jury disagree," and the *Allen* charge infringes this right since the purpose of the instruction is to "facilitate agreement" (Pet. Br. 6). There is, however, clearly no occasion for the Court in this case to reexamine the *Allen* decision or the validity of the instruction there approved. For the challenged statements here in issue, as noted by the court below (R. 54), "did not in any sense purport to be the [*Allen*] charge." That charge, indeed, was not mentioned at the trial by anyone.

The *Allen* instruction was taken literally from a charge approved by the Supreme Court of Massa-

[10] See, also, *Allis* v. *United States*, 155 U.S. 117, 120–123, affirming *United States* v. *Allis*, 73 Fed. 165, 182–183 (C.C.E.D. Kans.). The charge given in that case (73 Fed. at 182–183) was substantially the same as the instruction in the later *Allen* case. However, the relevant language of the charge was apparently not before this Court in *Allis* (see 155 U.S. at 121).

chusetts in *Commonwealth* v. *Tuey,* 8 Cush. 1 (1851), where it appears at pages 2–3. As summarized by this Court in the *Allen* opinion (at p. 501), the charge stated:

> that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

It is apparent from a comparison between that instruction and the obviously extemporaneous remarks of the court here in issue that the two statements have little in common. There was no reference, for example, in the court's comment in this case to the fact that the jurors' duty to join in a verdict was binding only insofar as they could do so "conscientiously"—a key aspect of the *Allen* charge—nor

to any of the other carefully phrased considerations mentioned in that instruction. The instruction here in issue must, it is clear, stand or fall on its own merits. Even if the Court should conclude, in other words, that the judge's comments at the instant trial were vulnerable (despite the absence of objection), there would be no reason for the Court in this case to reconsider the historic *Allen* instruction proper.

In any event that classic charge, in the carefully worded form in which it received this Court's unanimous approval, is, we submit, a suitable method, when used in appropriate circumstances and in the sound discretion of the trial court, for reminding jurors of their duty to decide the case before them if it is possible for them to do so consistently with their conscientious convictions. First sanctioned by the Court in 1896, the instruction has been specifically reaffirmed and re-approved on at least two occasions, most recently in 1952. *Lias* v. *United States*, 284 U.S. 584 (1931), affirming 51 F. 2d 215, 218 (C.A. 4); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), affirming 190 F. 2d 506, 521–528 (C.A. 9).[11] Notwith-

[11] In *Lias*, the court of appeals had upheld a supplemental charge "substantially" similar to the *Allen* charge (51 F. 2d at 218). This Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. 604), affirmed the lower court's judgment *per curiam*, simply citing the *Allen* decision (284 U.S. 584).

In *Kawakita*, the lower court had similarly upheld a supplemental charge substantially like the *Allen* instruction (190 F. 2d at 521–528). Although the use of the instruction w[illegible] one of the alleged errors relied on for reversal (Brief for Pe-

standing a few recent critical references to the *Allen* charge by some of the judges of the Fifth and District of Columbia Circuits,[12] it has been generally and repeatedly approved by the lower federal courts,[13] and has been endorsed in terms or in substance by an over-

---

titioner, No. 570, Oct. Term, 1951, pp. 160–169), this Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice" (343 U.S. at 744).

[12] See *Huffman* v. *United States*, 297 F. 2d 754, 759 (C.A. 5), certiorari denied, 370 U.S. 955 (Brown, J., dissenting); *Green* v. *United States*, 309 F. 2d 852, 854, n. 3 (C.A. 5) (*dictum*); *Campbell* v. *United States*, 316 F. 2d 681, n. 1 (C.A.D.C.) (*dictum*). And see the dissent below, at R. 56.

[13] Some of the more recent decisions have been: *Estes* v. *United States*, 335 F. 2d 609, 618–619 (C.A. 5), certiorari denied January 18, 1965, No. 601, this Term; *United States* v. *Kahaner*, 317 F. 2d 549, 483–485 (C.A. 2), certiorari denied, 375 U.S. 836; *Andrews* v. *United States*, 309 F. 2d 127, 129 (C.A. 5), certiorari denied, 372 U.S. 946; *United States* v. *Rogers*, 289 F. 2d 433, 434–437 (C.A. 4); *Wegman* v. *United States*, 272 F. 2d 31, 35 (C.A. 8); *Anderson* v. *United States*, 262 F. 2d 764, 773–774 (C.A. 8), certiorari denied, 360 U.S. 929; *Hagans* v. *United States*, 261 F. 2d 924, 927–928 (C.A. 5), certiorari denied, 359 U.S. 967; *Christy* v. *United States*, 261 F. 2d 357, 361 (C.A. 9), certiorari denied, 360 U.S. 919; *Costello* v. *United States*, 255 F. 2d 389, 398 (C.A. 8), certiorari denied, 358 U.S. 830; *Kleven* v. *United States*, 240 F. 2d 270, 273 (C.A. 8); *Hutson* v. *United States*, 238 F. 2d 167, 172–174 (C.A. 9); *Wolin* v. *United States*, 211 F. 2d 770, 772 (C.A. 4), certiorari denied, 348 U.S. 819; *United States* v. *Gordon*, 196 F. 2d 886, 891–892 (C.A. 7), reversed on other grounds, 344 U.S. 414; *United States* v. *Furlong*, 194 F. 2d 1, 2–4 (C.A. 7), certiorari denied, 343 U.S. 950; *Wright* v. *United States*, 175 F. 2d 384, 388 (C.A. 8), certiorari denied, 338 U.S. 873; *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506, 508–509 (C.A. 2); *Speak* v. *United States*, 161 F. 2d 562, 564–565 (C.A. 10); *Bowen* v. *United States*, 153 F. 2d 747, 751 (C.A. 8), certiorari

whelming majority of the States which have had occasion to consider it or a similar charge.[14]

Since "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves," as the Court observed in the *Allen* case itself, it "certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself," nor that "each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment * * *." 164 U.S. at 501. Human nature being what it is, moreover, there is a danger that some jurors, having once expressed their view of the case in the jury room, may find it psychologically difficult, due to pride or obstinacy, to withdraw from this position subsequently—even though they might honestly come to believe, on the basis of arguments advanced by their fellow jurors, that their

---

denied, 328 U.S. 835; *Bord* v. *United States*, 133 F. 2d 313, 315 (C.A.D.C.), certiorari denied, 317 U.S. 671; *Culp* v. *United States*, 131 F. 2d 93, 101 (C.A. 8); *Weathers* v. *United States*, 126 F. 2d 118, 119–120 (C.A. 5), certiorari denied, 316 U.S. 681; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800; *Coupe* v. *United States*, 113 F. 2d 145, 149 (C.A.D.C.), certiorari denied, 310 U.S. 651; *Hewitt* v. *United States*, 110 F. 2d 1, 10 (C.A. 8), certiorari denied, 310 U.S. 641. Cases from every circuit are collected in *United States* v. *Tomoya Kawakita*, 96 F. Supp. 824, 857, n. 6 (S.D. Cal.), affirmed, 190 F. 2d 506 (C.A. 9), affirmed, 343 U.S. 717.

[14] See Appendix, *infra*, pp. 33–37.

initially expressed view is no longer defensible. The very act of reaching a verdict in a criminal case, furthermore, is a duty which many jurors, loath to assume responsibility for another man's fate, would undoubtedly prefer to shirk. The *Allen* instruction is designed to meet these and similiar contingencies. It combines, in appropriately balanced fashion, a reminder to the jurors of their duty to decide the case before them, if it is humanly possible to do so, and an explicit *caveat* that the verdict must at the same time reflect the true views of each, conscientiously arrived at.

The effective functioning of a jury system obviously requires that cases be decided. The *Allen* charge represents a fair accommodation between society's and the accused's common interest in the avoidance, so far as possible, of a "hung" jury—which decides nothing and requires retrial—and the parties' similarly shared concern that the verdict be *truly* unanimous.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

MARCH 1965.

APPENDIX

STATE DECISIONS WHICH HAVE APPROVED *ALLEN*-TYPE INSTRUCTIONS

Allen-type instructions[1] have been approved in at least 32 states.[2] See, *e.g.*, *Bufkins* v. *State*, 20 Ala. App. 457, 460–461 (1924), certiorari denied *sub nom. Ex parte Bufkins*, 212 Ala. 638 (1925); *Chase* v. *State*, 369 P. 2d 997, 1004–1005 (Alaska 1962); *McGaha* v. *State*, 216 Ark. 165, 172 (1949); *People* v. *Baumgartner*, 166 Cal. App. 2d 103, 105–108 (1958); *Sevilla* v. *The People*, 65 Colo. 437, 441–442 (1918), reaffirmed in *Mills* v. *People*, 146 Colo. 457, 462–463 (1961), certiorari denied, 369 U.S. 841; *State* v. *Walters*, 145 Conn. 60, 62–64 (1958), appeal dismissed, 358 U.S. 46; *State* v. *Maclary*, 193 A. 2d 195 (Del. 1963); *Yancy* v. *State*, 173 Ga. 685, 689–692 (1931); *State* v. *Tope*, 86 Idaho 462, 468–469 (1963); *State* v. *Bogardus*, 188 Iowa 1293, 1298–1301 (1920); *Abbott* v. *Commonwealth*, 352 S.W. 2d 552, 554 (Ky. 1961); *State* v. *Dudoussat*, 47 La. Ann. 977, 998–999 (1895); *State* v. *Pike*, 65 Me. 111, 116 (1876); *Commonwealth* v. *Tuey*,

---

[1] By this term we mean, in general, supplemental instructions given to disagreeing jurors, urging them to harmonize their differences and join in a verdict if possible. The particular phraseology of such instructions has differed widely from State to State and from case to case. In a substantial number of the cases cited in the list which follows (between a third and a half), the charge was patterned closely after the original *Tuey* charge (*Commonwealth* v. *Tuey*, 8 Cush. (Mass.) 1, 2–3 (1851)), the prototype of the instruction approved in the *Allen* case (*Allen* v. *United States*, 164 U.S. 492, 501).

[2] There may well be others. Our study of the State decisions has not been exhaustive.

8 Cush. (62 Mass.) 1, 2–4 (1851), reaffirmed in *Highland Foundry Co.* v. *New York, New Haven, and Hartford Railroad Co.*, 199 Mass. 403, 407 (1908), and *Commonwealth* v. *Hassan*, 235 Mass. 26, 33 (1920); *People* v. *Chivas*, 322 Mich. 384, 392–395 (1948); *State* v. *Doan*, 225 Minn. 193, 202–206 (1947); *State* v. *Bozarth*, 361 S.W. 2d 819, 826 (Mo. 1962); *State* v. *Williams*, 39 N.J. 471, 481–485 (1963), certiorari denied, 374 U.S. 855; *Territory* v. *Donahue*, 16 N.M. 17, 26–28 (1911), reaffirmed in *State* v. *Horton*, 57 N.M. 257, 261–262 (1953); *State* v. *Pugh*, 183 N.C. 800, 802 (1922); *Montgomery* v. *State*, 19 Okla. Cr. 224, 227–229 (1921); *State* v. *Butler*, 96 Ore. 219, 237–242 (1919); *Commonwealth* v. *Campbell*, 116 Pa. Super. 180, 189 (1935); *State* v. *Scott*, 123 Atl. 292 (R.I. 1924); *State* v. *Pulley*, 216 S.C. 552, 555–557 (1950); *State* v. *Egland*, 23 S.D. 323, 326–328 (1909); *Simmons* v. *State*, 198 Tenn. 587, 594–596 (1955); *Rippetoe* v. *State*, 67 Tex. Cr. 192, 196–197 (1912); *State* v. *Gorham*, 67 Vt. 365, 371–372 (1894); *State* v. *Thomas*, 63 Wash. 2d 59, 65–67 (1963); *Boyd* v. *State*, 217 Wis. 149, 158–159 (1935); *Nicholson* v. *State*, 24 Wyo. 347, 356–358 (1916). Cf. *People* v. *Faber*, 199 N.Y. 256, 260–261 (1910) (*dictum*).

In only three States, to our knowledge—Arizona, Kansas, and Montana—has an instruction patterned substantially after the *Allen* charge been disapproved. *State* v. *Thomas*, 86 Ariz. 161 (1959); *Eikmeier* v. *Bennett*, 143 Kans. 888 (1936); *State* v. *Randall*, 137 Mont. 534, 540–542 (1960).[3]

---

[3] In *Counts* v. *Commonwealth*, 137 Va. 744, 747–750 (1923), the court, while approving generally the idea of a supplemental charge designed to encourage disagreeing jurors to concur in a verdict by discouraging obstinacy and pride of opinion, held reversibly erroneous an instruction whose thrust, aimed at the minority of the jurors, suggested that the view of the

In *State* v. *Thomas, supra,* the Arizona Supreme Court acknowledged that the instruction (referred to in that State as the "Voeckell" instruction, after *State* v. *Voeckell,* 69 Ariz. 145 (1949), where it was originally *approved*) contains no "misstatement of the law" (86 Ariz. at 166). Noting, however, that the charge had been before the court four times, that in each instance the propriety of its use had depended on the facts and circumstances of the particular case, and that its continued employment would cause "harassment and distress in the administration of justice," the court ruled that the instruction would no longer be sanctioned (*ibid.*). The court, nevertheless, subsequently affirmed a conviction in which the "Voeckell" instruction had (prior to the *Thomas* decision) been given. *State* v. *Evans,* 88 Ariz. 364, 373–374 (1960), certiorari denied, 371 U.S. 835.

Although the Kansas Supreme Court, in *Eikmeier* v. *Bennett, supra,* a civil case, expressed general disapproval of *Allen*-type instructions, it noted, in a contemporaneously decided criminal case, that it had seldom held the giving of such an instruction to be so prejudicially erroneous as to require reversal. *State* v. *Pyle,* 143 Kans. 772, 781 (1936). In the latter case,

---

majority was more likely to be the correct one. Citing an earlier Virginia decision to the effect that it is the duty of jurors to discuss the evidence with open minds and to agree on a verdict, if possible, without sacrificing conscientious convictions, the court said that "this means that the views of a minority, as well as the views of the majority of the jurors, should be given careful consideration by their fellows" (137 Va. at 748). Virginia would thus, presumably, disapprove of that aspect of the *Allen* charge which suggests that where "much the larger number" of the jurors are of one view the jurors in the minority should ask themselves whether their view might not be incorrect in view of its failure to impress the majority.

the court refused to disturb a verdict of guilt returned after the giving of such a charge—partly on the ground that the instruction had not been objected to. And in *State* v. *Neff*, 169 Kans. 116, 125–129 (1950), certiorari denied, 340 U.S. 866, the court again declined to reverse a conviction resulting from such an instruction—even though there the accused had objected.

In *Leech* v. *People*, 112 Colo. 120 (1944), referred to by petitioner at Pet. Br. 14, the court alluded to the *Allen* charge as having been "*sometimes facetiously referred to* as the third degree [instruction]" (emphasis added) (112 Colo. at 123). The opinion made it explicitly clear, however, that the charge had been "carefully considered and approved by this court" (*ibid.*). See, also, *Mills* v. *People*, 146 Colo. 457, 462–463 (1961), certiorari denied, 369 U.S. 841, a later Colorado decision, cited above.

The New Mexico Supreme Court's reference to the *Allen* charge as "the shotgun instruction" (*State* v. *Nelson*, 63 N.M. 428, 431 (1958), certiorari denied, 361 U.S. 877, cited by petitioner at Pet. Br. 14) was made in the context of a case in which the charge had gone far beyond the *Allen* instruction proper. New Mexico approves the *Allen* instruction in its unembellished form *State* v. *Horton*, 57 N.M. 257, 261–262 (1953), reaffirming *Territory* v. *Donahue*, 16 N.M. 17, 26–28 (1911), both cited *supra*.

Petitioner's statement that the courts of Idaho and Wisconsin have discouraged the use of the *Allen* charge (Pet. Br. 14) is incorrect. The instruction criticized in *State* v. *Moon*, 20 Idaho 202, 220–222 (1911), cited by petitioner, was a slanted version of the charge, so phrased that it left the impression that the judge had taken it for granted that the majority of the jury were for conviction. The Wisconsin decisions cited are not in point, most having to do with

an instruction—not part of the *Allen* charge—calling the jury's attention to the expense of another trial. Indeed, in one of the decisions, *Secor* v. *State,* 118 Wis. 621 (1903), the instruction challenged was specifically declared to be—aside from the reference to expense—"unexceptionable" (118 Wis. at 637–638). See, also, *Boyd* v. *State,* 217 Wis. 149, 158–159 (1935), cited *supra.*

U.S. GOVERNMENT PRINTING OFFICE : 1968

SUPREME COURT OF THE UNITED STATES

No. 761.—October Term, 1964.

Melvin C. Jenkins, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[April 5, 1965.]

Per Curiam.

Petitioner was charged in a two-count indictment in the United States District Court for the District of Columbia, with robbing a High's Dairy Products store on December 27, 1962 (count 1), and with assault with intent to rob upon the proprietress of a grocery store on January 24, 1963 (count 2), in violation of §§ 22–2901 and 22–501, respectively, of the District of Columbia Code. Following a trial by jury, he was found guilty on count 1 and not guilty on count 2. He was sentenced to imprisonment for from three to 10 years. A divided Court of Appeals affirmed the conviction, 330 F. 2d 220. A petition for rehearing *en banc* was denied, four judges dissenting.

Slightly more than two hours after the jury retired to deliberate, the jury sent a note to the trial judge advising that it had been unable to agree upon a verdict "on both counts because of insufficient evidence." The judge thereupon recalled the jury to the courtroom and in the course of his response stated that "You have got to reach a decision in this case." We granted certiorari, — U. S. —, to consider whether in its context and under all the circumstances of this case the statement was coercive. The Solicitor General in his brief in this Court stated:

> "Of course, if this Court should conclude that the judge's statement had the coercive effect attributed

to it, the judgment should be reversed and the cause remanded for a new trial; the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."

Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it. Accordingly the judgment of the Court of Appeals is reversed and the cause remanded for a new trial. Cf. *Brasfield* v. *United States*, 272 U. S. 448, 450; *Burton* v. *United States*, 196 U. S. 283, 307–308; *United States* v. *Rogers*, 289 F. 2d 433, 435 (C. A. 4th Cir.)

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN, dissent.